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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

versus

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the decision has negated the clearly expressed intent of Congress in an important peice of legislation, Section 208 of the Harbor Development and Navigation Improvement Act of 1986, 33 USC 2236, *infra, p. 4, hereafter "HDNI"?*

2) Whether the decision is in conflict with Japan Line v. Los Angeles, 441 U.S. 434, 60 L.Ed.2d 336, 104 S.Ct. 2237 (1979)?

3) Whether the decision is in conflict with the holding in *South Central Timber Development v. Wunnicke,* 467 U.S. 82, 81 L.Ed.2d 71, 104 S.Ct. 2237 (1984)?

4) Whether the decision fails to give effect to the Import/Export Clause of the Constitution, Art. 1, §10, cl. 2; *infra,* p. 2?

5) Whether the decision fails to give effect to 33 USC 10, the act admitting Louisiana to the Union, 33 USC 5, and the Tonnage Clause of the Constitution, Art. 1, §10, cl. 3; *infra.* p. 2?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those set forth in the caption of the case in this Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

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The Import/Export Clause

Article 1, Section 10, Clause 3 2,16,27
The Tonnage Clause

Statutes:

33 U.S.C. 5 2,27

33 U.S.C. 10 3,26

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The decision of the District Court is reported as *New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District,* 690 F.Supp. 1515, 24 SRR (Pike & Fisher) 1326 (E.D. La., 1988), App., p. 24. The decision of the Court of Appeals is reported under the same title, 874 F.2d 1018, 25 SRR (Pike & Fisher) 205 (5th Cir., 1989), App., p. 1 ; amended and reh. den., 891 F.2d 1153, 25 SRR (Pike & Fischer) ____ (5th Cir., 1989), App., p. 22.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED

i) The judgment below was entered on June 9, 1989, App., p. 1.

ii) Rehearing was denied on December 29, 1989, App., p. 22.

iii) The statutory provision conferring jurisdiction on this Court to review the judgment is 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

Article 1, Section 8, CLause 2 - The Commerce Clause

"The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article 1, Section 10, Clause 2 - The Import/Export Clause

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Article 1, Section 10, Clause 3, - The Tonnage Clause

> 'No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unles actually invaded, or in such imminent Danger as will not admit of delay."

STATUTES

33 U.S.C. 5:

> **§ 5. Abolition of tolls on Government canals, canalized rivers, etc.; expense of operation, repairs to and reconstruction of canals, etc.; Panama Canal excepted**
>
> No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for passing through any lock, canal, canalized river, or other work for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed; and for the purpose of preserving and continuing the use and navigation

of said canals and other public works without interruption, the Secretary of the Army, upon the recommendation of the Chief of Engineers, United States Army, is authorized to draw his warrant or requisition, from time to time, upon the Secretary of the Treasury to pay the actual expenses of operating, maintaining, and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury out of any money in the Treasury not otherwise appropriated: *Provided,* That whenever, in the judgment of the Secretary of the Army, the condition of any of the aforsaid works is such that its entire reconstruction is absolutely essential to its efficient and economical maintenance and operation as herein provided for, the reconstruction thereof may include such modifications in plan and location as may be necessary to provide adequate facilities for existing navigation: *Provided further,* That the modifications are necessary to make the reconstructed work conform to similar works previously authorized by Congress and forming a part of the same improvement, and that such modifications shall be considered and approved by the Board of Engineers for Rivers and Harbors and be recommended by the Chief of Engineers before the work of reconstruction is commenced: *And provided further,* That nothing contained in this section shall be held to apply to the Panama Canal.

33 U.S.C. 10:

§ 10. Waters in Louisiana Purchase as public highways

All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.

33 U.S.C. 2236:

§ 2236. Port or harbor dues

(a) Consent of Congress

Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

(1) Purposes

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

33 U.S.C. 2236 (cont.):

(2) Limitation on port or harbor dues for emergency service

Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

(3) General limitations

(A) Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project a mean low water before construction. In the case of project features which solely—

(i) widen channels or harbors,

(ii) create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or

(iii) remove obstructions to navigation,

only vessels at least comparable in size to those used to justify these features may be charged under this section.

(B) In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this subchapter, the non-Federal interest may consider such criteria as' elapsed time of passage, safety

33 U.S.C. 2236 (cont.):

of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim.

(C) Port or harbor dues authorized by this section shall not be imposed on—

(i) vessels owned and operated by the United States Government, a foreign country, a State, or political subdivision of a country or State, unless engaged in commercial services;

(ii) towing vessels, vessels engaged in dredging activities, or vessels engaged in intraport movements; or

(iii) vessels with design drafts of 20 feet or less when utilizing general cargo and deep-draft navigation projects.

(4) Formulation of port or harbor dues

Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non-Federal interest shall consider—

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

33 U.S.C. 2236 (cont.):

(D) any other pertinent factors.

(5) Notice and hearing

(A) Before the initial levy of or subsequent modification to port or harbor dues under this section, a non-Federal interest shall transmit to the Secretary—

(i) the text of the proposed law, regulation, or ordinance that would establish the port or harbor dues, including provisions for their administration, collection, and enforcement;

(ii) the name, address, and telephone number of an official to whom comments on and requests for further information on the proposal are to be directed:

(iii) the date by which comments on the proposal are due and a date for a public hearing on the proposal at which any interested party may present a statement; however, the non-Federal interest may not set a hearing date earlier than 45 days after the date of publication of the notice in the Federal Register required by subparagraph (B) of this paragraph or set a deadline for receipt of comments earlier than 60 days after the date of publication; and

(iv) a written statement signed by an appropriate official that the non-Federal interest agrees to be governed by the provisions of this section.

33 U.S.C. 2236 (cont.):

(B) On receiving from a non-Federal interest the information required by subparagraph (A) of this paragraph, the Secretary shall transmit the material required by clauses (i) through (iii) of subparagraph (A) of this paragraph to the Federal Register for publication.

(C) Port or harbor dues may be imposed by a non-Federal interest only after meeting the conditions of this paragraph.

(6) Requirements on non-Federal interest

A non-Federal interest shall—

(A) file a schedule of any port or harbor dues levied under this subsection with the Secretary and the Federal Maritime Commission, which the Commission shall make available for public inspection;

(B) provide to the Comptroller General of the United States on request of the Comptroller General any records or other evidence that the Comptroller General considers to be necessary and appropriate to enable the Comptroller General to carry out the audit required under subsection (b) of this section;

(C) designate an officer or authorized representative, including the Secretary of the Treasury acting on a cost-reimbursable basis, to receive tonnage certificates and cargo manifests from vessels which may be subject to the levy of port or harbor dues, export declarations from

33 U.S.C. 2236 (cont.):

shippers, consignors, and terminal operators, and such other documents as the non-Federal interest may by law, regulation, or ordinance require for the imposition, computation, and collection of port or harbor dues; and

(D) consent expressly to the exclusive exercise of Federal jurisdicitin under subsection (c) of this section.

(b) Audits.—The Comptroller General of the United States shall—

(1) carry out periodic audits of the operations of non-Federal interests that elect to levy port or harbor dues under this section to determine if the conditions of subsection (a) of this section are being complied with;

(2) submit to each House of the Congress a written report containing the findings resulting from each audit; and

(3) make any recommendations that the Comptroller General considers appropriate regarding the compliance of those non-Federal interests with the requirements of this section.

(c) Jurisdiction

(1) The district court of the United States for the district in which is located a non-federal interest that levies port or harbor dues under this section has original and exclusive jurisdiction over any matter arising out of or concerning, the imposition, computation, collection, and enforcement of port or harbor dues by a non-Federal interest under this section.

33 U.S.C. 2236 (cont.):

(2) Any person who suffers legal wrong or is adversely affected or aggrieved by the imposition by a non-Federal interest of a proposed scheme or schedule of port or harbor dues under this section may, not later than 180 days after the date of hearing under subsection (a)(5)(A)(iii) of this section, commence an action to seek judicial review of that proposed scheme or schedule in the appropriate district court under paragraph (1)

(3) On petition of the Attorney General or any other party, that district court may—

(A) grant appropriate injunctive relief to restrain an action by that non-Federal interest violating the conditions of consent in subsection (a) of this section;

(B) order the refund of any port or harbor dues not lawfully collected, and

(C) grant other appropriate relief or remedy.

(d) Collection of duties

(1) Delivery of certificate and manifest

(A) Upon arrival of vessel

Upon the arrival of a vessel in a harbor in which the vessel may be subject to the levy of port or harbor dues under this section, the master of that vessel shall, within forty-eight hours after arrival and before any cargo is unloaded from that vessel, deliver to the appropriate authorized representative appointed under subsection (a)(6)(C) of this section a ton-

33 U.S.C. 2236 (cont.):

nage certificate for the vessel and a manifest of the cargo aboard that vessel or, if the vessel is in ballast, a declaration to that effect.

(B) Before departure of vessel

The shipper, consignor, or terminal operator having custody of any cargo to be loaded on board a vessel while the vessel is in a harbor in which the vessel may be subject to the levy of port or harbor dues under this section shall, within forty-eight hours before departure of that vessel, deliver to the appropriate authorized representative appointed under subsection (a)(6((C) of this section an export declaration specifying the cargo to be loaded on board that vessel.

(e) Enforcement

At the request of an authorized representative referred to in subsection (a)(6)(C) of this section, the Secretary of the Treasury may:

(1) withhold the clearance required by section 91 of Title 46 for a vessel if the master, owner, or operatior of a vessel subject to port or harbor dues under this section fails to comply with the provisions of this section including any non-Federal law, regulation or ordinance issued hereunder; and

(2) assess a penalty or initiate a forfeiture of the cargo in the same manner and under the same procedures as are applicable for failure to pay customs duties under the Tariff Act of

33 U.S.C. 2236 (cont.):

> 1930 (19 App.U.S.C. 1202 et seq.) if the shipper, consignor, consignee, or terminal operatior having title to or custody of cargo subject to port or harbor dues under this section fails to comply with the provisions of this section including any non-Federal law, regulation, or ordinance issued hereunder.

(f) Maritime lien

Port or harbor dues levied under this section against a vessel constitute a maritime lien against the vessel and port or harbor dues levied against cargo constitute a lien against the cargo that may be recovered in an action in the district court of the United States for the district in which the vessel or cargo is found.

(Pub.L. 99-!662, Title II, § 208, Nov. 17, 1986, 100 Stat. 4102.)

STATEMENT OF THE CASE

The Plaquemines Port, Harbor & Terminal District (hereinafter "Plaquemines") is a creation of the Louisiana legislature whose territorial jurisdiction on the Mississippi River is concurrent with that of Plaquemines Parish. The parish (the Louisiana equivalent of a county) lies at the mouth of the Mississippi River and encompasses more than 100 miles of the river length. It provides anchorages for ships awaiting berths at the Port of New Orleans and at the ports and facilities located above New Orleans. All oceangoing ships proceeding to or from Mississippi River ports must pass through Plaquemines.

Plaquemines does not own or operate any docks, wharves or other facilities for the use of oceangoing

vessels. It does own and operate two fifty-foot crewboat type vessels referred to as patrol/rescue/fire vessels.

Ships anchoring (or mooring at private facilities) in Plaquemines are charged a "Harbor Fee" on a *per diem* basis graduated according to length. Ships loading or unloading cargo at the privately owned and operated wharves and facilities within the parish are charged a "Supplemental Harbor Fee" based on the number of tons of cargo loaded and/or unloaded.

The charges are levied for the availability of the emergency response services provided by Plaquemines and the parish through its police, fire and other departments, as well as the two crewboats. The charges are not based on any direct or actual services provided to the ships by Plaquemines or the parish.

The plaintiff below/petitioner here, the New Orleans Steamship Association, is an incorporated, non-profit, association whose membership includes the owners, operators and agents of oceangoing ships in foreign commerce calling at the ports and facilities on the Mississippi River.

The Plaquemines litigation has had a lengthy history. Initially the charges were levied primarily against cargo and solely to support general governmental services "allocated" by the parish. This was found unlawful, *Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Disstrict,* 21 SRR (Pike & Fischer) 1072 (FMC, 1982).

Plaquemines thereafter acquired the two partol/rescue/fire vessels to support its charges which then were directed primarily against oceangoing vessels. Its tariff was found to be unlawfully discriminatory, *New Orleans Steamship Association v. Plaquemines Port,*

Harbor & Terminal District, 23 SRR (Pike & Fischer) 1363 (FMC, 1986). Continued operation by Plaqueminens under that tariff was held unlawful, *New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District,* 816 F.2d 1074, 24 SRR (Pike & Fischer) 202 (5th Cir., 1987).

Appeal was taken from the decision of the Federal Maritime Commission, which was affirmed, *Plaquemines Port, Harbor & Terminal District v. Federal Maritime Commission,* 838 F.2d 536, 1988 AMC 2774, 24 SRR (Pike & Fischer 813 (D.C. Cir., 1988).

The present case involves the third Plaquemines tariff the one formulated after the 1986 decision of the Federal Maritime Commission. Again it focuses primarily on oceangoing vessels and its discriminatory features are the subject of a complaint filed with the Federal Maritime Commission, held in abeyance during the pendency of this litigation.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the district court was based on the federal questions involved, 28 U.S.C. 1331, and the provisions of the Harbor Development and Navigation Improvement Act of 1986, 33 U.S.C. 2236(c) (3) (A), *supra,* p. 10.

ARGUMENT

I.

The Decision Below Negates the Plain Language of the Harbor Development and Navigation Improvement Act of 1986

The decision acknowledges that "the language of the

HDNI appears to forbid all port fees except those to which Congress has expressly consented."[1] This is the clearly stated intent of the statute but the decision relies instead on a "legislative history" consisting of a statement (taken out of context[2]) before a committee by a senator testifying in a prior Congress, on a bill which was not enacted.[3] In so doing the decision holds that "his comments deserve great weight" and adds "problems with legislative history 'disappear' when sponsor speaks."[4]

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1. 874 F.2d at 1025; App., p 16.
This should have ended the inquiry.

> "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive." *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L.Ed.2d 766, 772, 100 S.Ct. 2051, 2056 (1980).

The language of the act is entirely plain and straightforward. Both it and its legislative history confirm the clearly expressed intent of Congress to restrict the imposition of port or harbor dues solely to nonfederal interests undertaking harbor development and navigation improvement projects.

2. The remarks were before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee. The Subcommittee, by its very role, was concerned with the extent to which the bill invaded the Federal fisc and imposed charges on waterway users. Senator Abdnor, in turn, assured it that the bill about which he was testifying would not permit the imposition of charges unless imposed in connection with a project under the proposed, but not enacted, bill.

3. The testimony by Senator Abdnor was on Senate Bill 1739 of the 98th Congress, 2nd Session, and was presented by him on June 15, 1984. The HDNI Act was derived from House Bill HR6 of the 99th Congress, 2nd Session, which became Public Law 99-662, November 17, 1986, 100 Stat. 4082.

4. 874 F.2d at 1025 and Fn. 57; App., p. 16.

a) *The Language of the HDNI Act*

Congress could not have been more specific in its terms; the HDNI Act permits the imposition of "Port or harbor dues"[5] by giving the "Consent of Congress".[6]

The condition of the consent is thereafter set forth by stating that "subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded or unloaded from that vessel under Clauses 2 and 3 of Section 10, and under Clause 3 of Section 8 of Article 1 of the Constitution."[7] Such permitted "port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes."[8] The purposes for which the dues are consented to include the ability of the non-Federal interests to "provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities."[9]

The harbor fee and supplemental harbor fee of Plaquemines are just such "port or harbor dues" which are levied for the purpose of providing standby "emergency response services." The Plaquemines charges, accordingly, plainly fall within the precise definition of the HDNI Act;

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5. This is the title of 33 U.S.C. 2236, *supra*, p. 4.

6. This, in turn, is the title of 33 U.S.C. 2236(a), *supra*, p. 4.

7. *Id.*

8. 33 U.S.C. 2236(a) (1). *supra*, p. 4.

9. 33 U.S.C. 2236(a) (1) (B), *supra*, p. 4.

they are prohibited by its specific terms, absent a project undertaken pursuant to the Act.

Congress did not stop here, however, in delineating and limiting the conditions under which charges for such "emergency response services" could be assessed. Thus, they may not be charged "after the dues cease to be levied for the purposes described in paragraph (1) (A) of this subsection;[10], i.e., after the financing of the cost of construction, operation and maintenance of the project has been completed. Further, the fees can only be assessed against "vessels at least comparable in size to those used to justify these features."[11] Further, "port or harbor dues may be imposed by a non-Federal interest only after meeting the conditions of this paragraph"[12] dealing with the provision of notice and hearing before undertaking the imposition of port or harbor dues.

It is submitted that clearer language prohibiting the assessment of charges for emergency response services, other than in compliance with the provisions of the HDNI Act, could not be suggested. The intent, of Congress has been expressed in plain and unambiguous language.

b) *The Actual Legislative History*

As pointed out[13], the "legislative history" of the decision was based on 1984 testimony before a Committee on a Senate bill in the 98th Congress, which was not passed, rather than the House bill in the 99th Congress, which was passed in 1986, more than two years later. As the deci-

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10. 33 U.S.C. 2236(a)(2), *supra*, p. 5.

11. 33 U.S.C. 2236(a) (3) (A), *supra*, p. 5.

12. 33 U.S.C. 2236 (a) (5) (C)k, *supra*, p. 8.

13. *Supra*, p. 15.

sion states: "Congress believed nonfederal ports could charge only ships that benefited from port services."[14]

This was based on a specific statement in the House Report on the bill which became the law, quoted by the decision.[15] The quotation is as follows:

> "In the case of *Clyde Mallory Lines v. United States [Alabama],* 296 U.S. 261 [56 S.Ct. 194, 80 L.Ed. 215] (1935), the Supreme Court reaffirmed the limitation on the authority of local ports to levy [sic] fees to direct services, including wharfage, dockage, pilotage, stevedoring, and demurrage. . . ."

The decision continues by noting that "Section 2236 is built around this belief"[16], as indeed it is. This is the only thing to which Congress consented. Mindful that fees for indirect or standby services were not lawful, at least in its view, Congress determined that it would permit local ports to assess such fees only in connection with the harbor improvement projects contemplated by the Act.

Senator Stafford, the floor manager for the bill in the Senate, noted that it was the restrictive House bill which was before that body and which was enacted into law. He said:[17]

> ". . . The conference report allows non-Federal authorities to charge port use fees under certain controlled conditions. The Senate-passed bill offered the ports broad authority on user fees. . . .

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14. 824 F.2d at 1025, App., P. 16.

15. *Id.*, P. 1026, App., p. 16.

16. *Id.*, p. 1026, App., p. 17.

17. 144 cong. Rec. S16982 (Daily Ed., Oct. 17, 1986).

> The language we have agreed upon in this conference report is somewhat more restrictive. . . ."

This is the legislative history of the Act, not the remarks by Senator Abdnor on the Senate bill in the prior Congress. If legislative history were relevant, which we submit that it is not in view of the clarity of the language used by Congress, the legislative history demonstrates that it was the conclusion of Congress that fees for indirect or standby service were precluded absent its consent. It then gave its consent to such fees only in conjunction with harbor improvement projects under the Act. By so limiting its consent, it precluded such fees under any other circumstances.

c) *The "Play of the HDNI and Congress's Beliefs About the Power of Nonfederal Ports to Impose Fees"*

This section of the decision, we submit, is the equivalent of reading Tarot cards to determine the already clearly expressed language of the statute and intent of Congress. The Court raises questions but offers no answers other than the predetermined conclusion that the statute does not mean what it says and that the actual legislative history equally is meaningless.

It asks questions but avoids answers. Thus it says:[18]

> "We do not necessarily agree that *Clyde Mallory* distinguishes fees from direct services from those for indirect services. . . ."

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16. *Id.*, p. 1026, App., p. 17.

17. 144 Cong. Rec. S16982 (Daily Ed., Oct. 17, 1986).

18. 874 F.2d at 1026, Fn. 58, App., p. 17.

We submit that with this question unanswered, the decision has no meaning. If Congress determined correctly, as we believe that it did, that *Clyde Mallory* required the provision of direct services for the imposition of such fees, the Plaquemines fees plainly are unlawful, with or without the provisions of the HDNI Act. If it was incorrect in this conclusion, the fees are unlawful because they have been made so by the terms of the HDNI Act which specifically restricts the conditions under which they may be charged, following its passage.

The remaining questions which the decision seeks to pose are simply strawmen, of no consequence whatever. It is totally incorrect to say that the "framework leaves fees to finance emergency response services in an odd position."[19] They are not in an odd position at all; they simply are forbidden to be charged when not charged in conformance with the Act. This was the determination of Congress. The fact that "Section 2240 authorizes only $5 million for these grants [for the provision of emergency response services] for fiscal years 1987-1991"[20] is not meaningful. Congress obviously can appropriate funds as necessary during any period - if it considers such appropriation wise.

The reference to the fact that "fees for other services, such as wharfage and pilotage, attach to individual ships; they are not 'port or harbor dues'"[21] only reinforces the conclusion reached by Congress. These are direct services; there is no question that they can be charged.

We can only reiterate that this section of the decision

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19. *Id.*, p. 1026, App., p. 17.

20. *Id.*, p. 1026, and Fn. 63, App., p. 19.

21. *Id.*, p. 1027, App., pp. 19-20.

simply ignores the very plain meaning of the statute and the equally well articulated intent reflected in the legislative history to indulge in something equivalent to consulting Tarot cards to fathom the meaning of the Act.

II.

The Decision Denies the Nation the "Ability to Speak with One Voice", Ignoring the *Japan Line* Case

The services made available by the respondent below, Plaquemines, are identical to those provided by the county in *Japan Line v. Los Angeles,* 441 U.S. 434, 60 L.Ed.2d 336, 104 S.Ct. 2237 (1979). By allowing such charges to be imposed against foreign flag vessels which are instrumentalities of foreign commerce by this local governmental subdivision, the holding of the *Japan Line* case is totally ignored. While it is true that port fees for services may be "routinely employed by most port nations", Plaquemines simply is not a nation. The HDNI Act forbids such non-federal ports to impose fees without compliance with the terms of that Act and the provision of a project thereunder.

The Federal Maritime Commission has not been appointed to regulate the reasonableness of fees imposed by local ports, contrary to the statement of the decision. Plaquemines is regulated by the FMC as a "marine terminal operator" under the Shipping Act of 1984, *Plaquemines Port, Harbor & Terminal District v. Federal Maritime Commission,* 838 F.2d 536 (D.C. Cir., 1988).[22]

The FMC, under the Shipping Act of 1984, does not

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22. The decision refers, Fn. 13, App., p. 5, to the Shipping Act, 1916, 46 U.S.C. 801, erroneously. The Shipping Act, 1916 was superseded as to the foreign commerce involved here by the Shipping Act of 1984.

regulate the reasonableness *per se* of marine terminal operators. Its jurisdiction is limited to correcting "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic", 46 U.S.C. App. 1709 (b) (11), or "any undue or unreasonable prejudice or disadvantage", 46 U.S.C. App. 1709 (b) (12), i.e., to prevent discrimination between interests, not to determine a reasonable rate level. Thus, if the HDNI Act does not apply to Plaquemines, the nation has lost its ability to speak with one voice with respect to its foreign commerce.[23]

III.

The Decision Ignores the *Wunnicke* Decision and the Commerce Clause

The decision states that *South Central Timber Development v. Wunnicke,* 467 U.S. 82, 81 L.Ed.2d 71, 104 S.Ct. 2237 (1984), requires the consent of Congress to state or local actions only when they "impose substantial burdens" on interstate or foreign commerce.[24] This was the pre-*Wunnicke* law which had "long been recognized"[25] rather than the extended doctrine expressed in *Wunnicke.* Far beyond the "dormant Commerce Clause" rule announced in *Wunnicke,* the present case involves an active expression by Congress denying the ability of local authorities to levy the charges imposesd here except in conformance with the provisions of the HDNI Act. As pointed out in *Wunnicke:*

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23. The decision states that "Japan and California had already clashed over the taxation of the containers. 41 U.S. at 451, 99 S.Ct at 1823, 60 L.Ed.2d at 349." 874 F.2d at 1022, fn. 26, App., p. 9. We find no such reference in the decision.

24. 874 F.2d at 1022; App., p. 8.

25. 467 U.S. at 87, 81 L.Ed. at 76, 104 S.Ct. at 2240.

> ". . . Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state'. . . . A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." 467 US at 92, 81 L.E.2d at 79, 104 S.Ct. at 2242-3.

It was further noted, *Wunnicke,* Fn. 7, that:

> "The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied."

The effect of the Plaquemines charges, of course, does not fall on the residents of the parish but on the foreign commerce against which they are directed. A charge of $1.5 Million per annum is a "significant effect" (as well as a "substantial burden").

The decision states that to find a violation of the HDNI "we must find evidence that Congress intended its express consent to fees for emergency response services in conjunction with harbor improvement projects to imply

disapproval of those fees imposed absent projects."[26] As previously noted, the decision also found that "the language of the HDNI appears to forbid all port fees except those to which Congress has expressly consented."[27] This simply cannot be reconciled with *Wunnicke,* which held:

> "There is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not, as Alaska asserts, merely a wooden formalism. . . ." 467 US 82, 91, 81 L.Ed. 2d 71, 79, 104 S.Ct. 2237, 2242.

In contrast with *Wunnicke,*[28] Congress, indeed, has "expressly stated" in the HDNI Act that the charges cannot be imposed by Plaquemines.

IV

The Decision Misstates the *Washington Revenue Department* and *Michelin Tire* Cases and Fails to Give Effect to the Import/Export Clause on Goods "In Transit"

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26. 874 F.2d at 1024, App., p. 14.

27. *Id.*, p. 1025, App., p. 16.

28 The decision appears to base its view of the relationship between Congress and the states and the effect of the Commerce Clause on its quotation, 874 F.2d at 1023, Fn. 33, App., p. 10, from *Glouster Ferry Co. v. Pennsylvania,* 114 U.S. 196, 29 L.Ed. 158, 5 S.Ct. 826 (1885), to the effect that "courts need not fear state action as long as 'the power to arrest collision' with federal policies "resides in the National Congress'". This, it is submitted, is not law post-*Wunnicke.*

The opinions in *Washington Revenue Department v. Stevedoring Association*, 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978), and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 435 (1976), both dealt with goods which were no longer "in transit" and did not, therefore, pose any real conflict with the Import/Export Clause.[29] In the present case, the charges are levied against the vessels and cargoes at the very moment of their import or export transit, in violation of the clause, a fact ignored by the decision below.

Michelin Tire stands for the proposition that an *ad valorem* tax imposed, equally, on imported and domestic goods lying in distribution warehouses ((not in transit) does not invoke any prohibition of the Import/Export Clause. As states:

> "Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution...." 423 US at 302, 46 L.Ed.2d at 512, 96 S.Ct. at 548.

The subsequent *Washington Revenue* decision affirmed this fact stating that ". . . because the goods were no longer in transit, however, the [*Michelin* Court] did not have to face the question whether a tax relating to goods

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29. U.S. Const., Art. 1, §8, cl. 3; *supra*, p. 2.

in transit would be an Impost or Duty even if it offended none of the policies behind the Clause."[30]

In turn, *Washington Revenue Department,* equally, did not reach the point, specifically stating this:[31]

> "We do not reach the question of the applicability of the *Michelin* approach where a state directly taxes imports or exports in transit."

The present case does implicate the Import/Export Clause as to goods in transit and does impose a tax on those goods, directly, in contravention of the policies behind the clause by imposing duties on shippers and receivers in inland states.

V.

The Decision Fails to Give Effect to 33 U.S.C. 10, the Act Admitting Louisiana to the Union, 33 U.S.C. 5 and the Tonnage Clause

The decision in its rejection of 33 U.S.C. 10[32] simply misstates the holding in *Huse v. Glover,* 119 U.S. 543, 30

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30. 435 U.S. 734, 735, 55 L.Ed.2d 682, 700, 98 S.Ct. 1388, 1402 (1978).

31. 435 U.S. 734, 758, 55 L.Ed.2d 682, 702, 98 S.Ct. 1388, 1403 (1978).

32. *Supra,* p. 3.
The statute, derived from the act admitting Louisiana to the Union is set forth in the decision, 874 F.2d at 1024, App., p. 12, and provides that "all the navigable rivers and water of the former Territories of Orleans and Louisiana shall be and forever remain public highways."

The act admitting Louisiana to the Union, 2 Stat. at Large 703 (1812), also set forth in pertinent part in the decision, 874 F.2d at 1024, App., p. 12, provides that the "River Mississippi and the navigable rivers and waters leading into the same and into the Gulf of Mexico, shall be common highways . . . without any tax, duty, impost or toll therefore, imposed by said State."

L.Ed. 487, 7 S.Ct. 313 (1886). That case pointed out that the language in question (incorporated in the act admitting Louisiana to the Union) had been deleted from the act which admitted Illinois to the Union and, accordingly, had no bearing on that case. The provisions of 33 U.S.C. 5[33], in turn, were simply ignored by the decision below. By misconstruing *Clyde Mallory Lines v. Alabama*, 246 U.S. 261, 80 L.Ed. 215, 56 S.Ct. 194 (1935), the decision fails to give effect to the Tonnage Clause of the Constitution.[34]

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33. *Supra*, p. 2.
The statute provides that "no tolls or operating charges whatever shall be levied upon or collected from any vessel . . . for passing through any . . . canalized river, or other work for the use and benefit of navigation, now belonging to the United States. . . ." The Mississippi River by reason of its locks, dams levees, revetments, dredged channels and jetties plaintly is a canalized river. As such the decision is at variance, if not in conflict with *Indiana Port Commission v. Bethlehem Steel Corp.*, 835 F.2d 1207 (7th Cir., 1987).

34. Art. 1, §10, cl. 3; *supra*, p. 2.
The opinion of the District of Columbia Circuit, *Plaquemines Port, Harbor & Terminal District v. FMC*, 838 F.2d 536 (D.C. Cir., 1988), considered the *Clyde Mallory* case in a vacuum. Even as to the effect of that case with respect to the tonnage clause, we do not believe it can survive analysis here. Apart from the growth of the law in the Commerce Clause areas (as well as the statutes applicable here), we would point out the following:

1. The clause was passed in response to the suggestion of the Maryland delegates that the states should be allowed to lay tonnage taxes to support the building of lighthouses and clearing of harbors. As stated by the Court, footnote 1, 96 U.S. at 265, 80 L.Ed. at 218; 56 S.Ct. at 195:

> ". . .Despite the assertion that such works were peculiarly necessary in the Chesapeake, the convention proved hostile to state tonnage levies. There was uncertainty whether the commerce clause would forbid such duties: Gouverneur Morris said that it would not, Madison thought that it should, Sherman argued for a concurrent power over commerce with power in the United States to control state regulations. Whereupon the clause was added in its present form." (Citing Madison's Notes).

VI.

CONCLUSION

The decision below cannot be reconciled with either the Constitutional or statutory provisions involved or the prior decisions of this Honorable Court. It distorts both beyond their plain meaning and cries out for correction. It does involve important and basic questions which should not be ignored; indeed, it is submitted that a *per curiam*

Footnote 34 continued.
The concluding remarks, immediately preceding the vote, noted:

> "Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion 'that no State shall lay any duty on tonnage without the Consent of Congress.'" *2 Records of Federal convention*, 625 (M. Farrand ed., 1966).

The fact, pointed out by District of Columbis opinion, that the Maryland delegates voted in favor of the motion can give rise only to an inference that they were persuaded to reverse their position by Mr. Langdon and their fellow delegates. Certainly the clause as passed did not accede to their earlier request.

2. The emergency response services offered by Plaquemines must be contrasted with the all-pervasive "direct" services outlined in *Clyde Mallory* set forth in the decision of the Alabama Supreme Court, *Clyde Mallory Lines v. State*, 229 Ala. 624, 159 So. 53 (Ala., 1935), in that era before the regulation of our waterways had been taken over by the federal government. The total regulation of the harbor, actually inured to the benefit of all vessels calling at the port; it was a "direct service" as found by the House Report on the HDNI Act, quoted in the decision, 874 F.2d at 1026, App., pp. 16-17.

3. The stand-by services of Plaquemines do not equate with the "services rendered to and enjoyed by the vessel such as pilotage, or wharfage or charges for the use of locks on a navigable river or fees for medical inspection." 296 U.S. at 266, 80 L.Ed. at 218, 56 S.Ct. at 195, relied upon to support the charges in *Clyde Mallory*.

reversal on the granting of *certiorari* would be the

Footnote 34 continued.
4. On the contrary, the stand-by services of Plaquemines are identical to the stand-by availability of the services of the masters and wardens of the port in *Southern Steamship Co. v. The Masters and Wardens of the Port of New Orleans*, 73 U.S. (6 Wall.) 31, 18 L.Ed. 749 (1867) or the stand-by availability of the services of the quarantine officers in *Peete v. Morgan*, 86 U.S. (19 Wall.) 581, 22 L.Ed. 201 (1874). In both instances, the charges imposed were unconstitutional tonnage taxes; they were not for "direct services."

5. The stand-by services of the *Master and Wardens* were explained by the Louisiana Supreme Court as follows:

> "The maintenance of these officers (who also regulate the conduct of the pilots) is a benefit to the entire shipping interest, and each ship receives an equivalent in the convenience of obtaining the services and immediate presence of these officers, although they may not have been called upon to perform any special duty for the particular ship in question." *Port of New Orleans v. Ship Charles Morgan*, 14 La. Ann. 595 (1859) rev'd *Southern Steamship Co. v. The Masters and Wardens of the Port of New Orleans*, 73 U.S. (6 Wall.) 31, 18 L.Ed. 749 (1867).

The stand-by Plaquemines services are on an identical footing., i.e. each ship receives an equivalent in the convenience of obtaining the service and immediate presence of the service, although Plaquemines may not have been called upon to perform any special duty for the particular ship in question.

6. Prior to the HDNI Act, states had authority to impose fees for harbor or waterway improvements, *viz.* The locks of *Huse v. Glover*, 319 U.S. 543, 30 L.Ed. 487, 7 S.Ct. 313 (1886); they also could impose fees when they provided "direct services," *Clyde Mallory Lines v. Alabama*. On the other hand, where only stand-by (as distinguished from "direct") services were involved no fees could be charged, *Southern Steamship Co. v. The Masters and Wardens of the Port of New Orleans*, 73 U.S. (6 Wall.) 581, 22 L.Ed. 701 (1874).

7. As stated by Judge Bork of the DC Circuit, 838 F.2d at 545, ". . .all vessels, whether or not they catch fire or need rescue services benefit from their availability. . . ." It is just this "benefit from their availability" which makes the standby services of Plaquemines "indirect." As

appropriate remedy where the errors are so manifest and the applicable law is so clear.

Respectfully submitted,

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Footnote 34 continued.
he also analyzed *Clyde Mallory* ". . .the services rendered by the Port of Mobile inured to all who entered the port. . . ." These, in turn, were "direct services," in fact; where Plaquemines charges are for the availability of its stand-by services, they can only be classified as "indirect, " as concluded by the House Report on the HDNI Act.

8. The "Consent of Congress," accordingly, was not needed for the "direct services" of harbor improvements but only for "emergency response services," which are not such "direct services."

9. Congress, having spoken under the Commerce Clause, now has mandated that, before fees can be charged either for harbor or waterway improvements (as distinguished from charges for the use of facilities such as docks and wharves, which the vessels elect to use) or for emergency response services, i.e. whether the services are "direct" or not, there must be compliance with the HDNI Act.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari and the Appendix have been served on Louis B. Porterie, Esq. and Robert E. Fontenelle, Jr., Esq. by depositing the same in the United States Mail, postage prepaid, addressed to them at their office, 4000 General de Gaulle Drive - Suite 300, New Orleans, LA 70114, this _____ day of March, 1990.

_____

EDWARD S. BAGLEY

APPENDIX A

NEW ORLEANS STEAMSHIP ASSOCIATION,
Plaintiff-Appellant,

v.

PLAQUEMINES POST, HARBOR AND TERMINAL DISTRICT.
Defendant-Appellee.

No. 88-3467.

United States Court of Appeals,
Fifth Circuit.

June 9, 1989.

Nonprofit organization of owners, stevedores and vessel agents brought action challenging port and harbor dues imposed by port district. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 690 F.Supp. 1515, dismissed claim. Appeal was taken. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) port district's imposing a fee for emergency support services did not violate commerce clause, and (2) Harbor Development and Navigation Improvement Act of 1986 did not prevent port district from charging of fee to oceangoing vessels to pay for emergency support services.

Affirmed.

Appeal from the United States District Court for the Eastern District Court for the Eastern District of Louisiana.

Before WISDOM, GARWOOD, and JOLLY, Circuit Judges.

WISDOM, Circuit Judge:

The question this case presents is whether the Port of Plaquemines Parish may impose charges on ships to finance emergency response services. The New Orleans Steamship Association (NOSA) argues that the Port's charges violate the commerce clause of Article 1 of the United States Constitution,[1] the foreign commerce clause,[2] the tonnage clause,[3] the import-export clause,[4] the statute admitting Louisiana to the Unions, and the Harbor Development and Navigation Improvement Act of 1986 (HDNI).[6] The district court granted the Port's motion to dismiss NOSA's claims. We hold that ships in the Mississippi River are subject to paying reasonable port fees for services rendered. We affirm.

I.

The Port of Plaquemines Parish is the 102-mile nar-

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[1]The commerce clause gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.Const. art. I, § 8, cl. 3.

2. *Id.*

3. *Id.* at § 10, cl. 3:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage. . . .

4. *Id.* at cl. 2:

5. 33 U.S.C. § 10 (1982).

6. 33 U.S.C. §§ 2231-2241 (Supp.1988)

row stretch of land bordering the Mississippi River from New Orleans to the Gulf of Mexico. Approximately 5,4000 oceangoing vessels pass through the Port each year on their way to or from other ports along the River; another 3,876 or so oceangoing vessels dock or anchor in the Port. Unlike most ports, Plaquemines neither owns nor operates wharves, docks, or other facilities; all facilities are privately owned.

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .

By virtue of its police power and an agreement with the United States Coast Guard, the Port has primary responsibility for responding to fires, explosions, and other emergencies that occur within its territory.[7] The Port operates several ships with firefighting and rescue capabilities, a helicopter, land-based pumping units, and a staff to maintain these facilities.[8] It finances these emergency response services with two fees. It assesses a "Harbor Fee" for each day a vessel remains in the Port, moored or at anchor. The fee is determined by the length

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[7]Memorandum of Understanding Between the Coast Guard and the Plaquemines Parish Commission Council, approved by the Coast Guard, September 4, 1979; Letter from John L. Bailey, Captain, U.S. Coast Guard, to Jim Hoffman, Plaquemines Parish Fire Marshal (June 3, 1983) ("Maintenance of adequate disaster response capabilities for fires, explosions, and other similar incidents is the responsibility of local port operators, municipalities and public agencies.") Record at 457.

8. The Port operates two patrol rescue/firefighting vessels, with a total of twelve crewmen on duty twenty-four hours, plus a fulltime maintenance person; a ferryboat with firefighting capability; mobile pumps; and a 24-hour maritime communications network. In addition, the Parish maintains fire and rescue equipment more powerful than it needs for its own use.

of the vessel. It is waived for ships detained in the harbor by fog for fewer than 12 hours.[9] The Port also assesses a "Supplemental Harbor Fee" against oceangoing vessels that load or unload cargo in the Port. The fee is 2½ cents per ton for cargo and ½ cent per barrel for liquid cargo.

The parties stipulate that the fees are reasonable.[10] The fees bring the Port approximately $1.5 million each year.[11] In 1984, two years before the current fees were announced, the services cost the Port $1,394,369.[12]

The Port announced the fees it now charges in

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9. The port contends that it does not charge ships remaining less than one day or those vessels delayed by weather. Because this is before us on the Port's motion to dismiss, we accept NOSA's allegations to the contrary as true.

10. This agreement was reached after years of wrangling. *See Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist.*, No. 78-860 (E.D.La. filed March 15, 1978) (challenging fee announced in 1977), *stayed pending decision by Federal Maritime Commission*, 1980 *dismissed as moot*, 1983; *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist.*, 21 S.R.R. 219 (I.D.1981), *adopted* 21 S.R.R. 1072 (F.M.C.1982) (invalidating fee announced in 1977). The Port appealed, but the parties settled before the appeal was decided. The Port returned 80% of the fees collected and allowed public comment on a new fee. Record at 620.

In 1982, the Port announced tha[illegible] fee. It was invalidated. *New Orleans Steamship Ass'n. v. Plaquemines Port, Harbor, and Terminal Dist.* Docket No. 83-2 (F.M.C.Sept. 16, 1986), *aff'd sub nom. Plaqumines Port Harbor, and Terminal Dist. v. Federal Maritime Comm'n*, 838 F.2d 536 (D.D.Cir.1988) (Bork,J.) The fees at issue in this case were announced in October 1986. *See infra* note 14.

11. Affidavit of H.R. Benvenutti, Port Manager (September 9, 1987). At oral argument, NOSA said that the Port may collect between $1.2 million and $1.8 million each year.

12. Record at 452.

October 1986. NOSA challenged them before the Federal Maritime Commission (FMC), which has authority to ensure that fees charged by nonfederal port authorities are reasonable.[13] The FMC approved the fees but did not address the constitutional or statutory issues NOSA presses before this Court.[14] NOSA filed this suit in federal district court for the Eastern District of Louisiana on June 1, 1987. On June 15, 1988, the district court granted the Port's motion to dismiss.[15] NOSA appeals.

II.

[1,2] NOSA argues that the Port has no power to charge harbor fees without Congress's consent. We disagree. State and local fees require congressional consent only if they impede interstate commerce or encroach upon subjects on which Congress has spoken.[16] The Port's fees do neither.

[3,4] NOSA misapprehends the relationship between the commerce clause and the Port's fees. The commerce clause prevents state and local regulations that promote parochial interests by discriminating against interstate

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13. 46 U.S.C. App. §§ 801, 816 (Supp.1988).

14. *See New Orleans Steamship Assn. v. Plaquemines Port, Harbor, and Terminal Dist.* Dist. No. 86-4328 (E.D.La. filed September 29, 1986) (seeking injunction barring Port from collecting fees), *dismissed after FMC approval of new fees,* Jan. 15, 1987, *dismissal aff'd.* aff'd. 816 F.2d 1074 (5th Cir.1987).

15. 690 F.Supp. 1515.

16. *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267, 56 S.Ct. 194, 196, 80 L.Ed. 215, 219 (1935).

commerce.[17] When a state or municipality participates in the marketplace, rather than regulating commerce, the commerce clause does not control its actions.[18] Plaquemines's fees wear the colors of both market regulation and market participation. The Port offers a service and receives payments tied to the costs of providing the service, just as would a private business. This fee-for-service approach is not a regulation, as, for example, would be a rule requiring every ship to provide its own fire fighting and rescue equipment. Neither, however, is the Port acting wholly as a market participant. The emergency response services embody the Port's governmental responsibilities for safety and health; they are not merely a business venture. Further, the Port uses its governmental authority to require payment, and some of the equipment belongs to the Parish's government.

The Supreme Court's decision in *Clyde Mallory Lines v. Alabama*,[19] equips us to evaluate hybrid activities such as the fees. That decision validates a fee levied by the Port of Mobile for police and health sevices. It holds that: (1) the service funded by the fee must enhance the safety and efficiency of interstate and foreign commerce, ensuring that the fee will not interfere with the purposes of the commerce clause; (2) the fee must be used to pay for the service, reinforcing the assumption of the market participant exception, that the Port will charge what the market would

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17. *See* The Federalist No. 42, at 267 (J. Madison) (C. Rossiter ed.1961); L. Tribe, *American Constitutional Law* §§ 6.1, 6.3 (2d ed. 1988) (describing early interpretations of commerce clause).

18. *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 208, 103 S.Ct. 1042, 1044, 75 L.Ed.2d 1, 6 (1983).

19. 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935).

allow; (3) the fee can place at most a small burden on interstate and foreign commerce.[20] Applying this test, courts have consistently held that ships may be made to pay for services they get.[21]

Plaquemines's fees easily meet the *Clyde Mallory* test. Emergency response services save lives, reduce damage to property, prevent fires from spreading to ships that would not otherwise need the services, and return the Port to full efficiency after an emergency. Second, the parties have stipulated that the fees are reasonable. Finally, the district court found a "dearth of evidence" that Plaquemines's fees burden interstate commerce. The Port has the power to impose the fees.

Although we have concluded that congressional consent is not necessary for approval of the fees, we note that Congress has acquiesced in them. It has created the FMC to regulate port or harbor fees; obviously, it approves of such fees. Most ports levy port or harbor fees, and Congress does not forbid them. Admittedly, congressional silence is an unstable foundation on which to base a finding of acquiescence.[22] Fees charged by local ports in this country, however, have been upheld by the courts since the 19th Century; it is hard to impute ignorance against that background. Indeed, Congress has shown that it knows

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20. 296 U.S. at 267-68, 56 S.Ct. at 196-97, 80 L.Ed.2d at 219.

21. *See id.*, 296 U.S. at 268, 56 S.Ct. at 197, 80 L.Ed.2d at 219 (listing cases); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 319-20, 13 L.Ed. 996 (1851) (local ports may charge for pilotage); *Indiana Port Comm'n v. Bethlehem Steel Corp.* 534 F.Supp. 858 (N.D. Ind.1981); *Vincent v. Foss & Crabtree*, 118 Fla. 717, 160 So. 49, 52 (S.Ct. Div. B 1935).

22. *See* W. Eskridge & P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 772-74 (1988) (congressional inaction ambiguous).

how to regulate port fees. The tonnage clause requires that states obtain the consent of Congress before financing harbor improvements by means of port or harbor fees; the Harbor Develpment and Navigation Improvement Act of 1986 (HDNI) allows fees for that purpose.[23]

III

A. *The Dormant Commerce Clause*

[5] NOSA argues that, even if Congress has acquiesced, it has not consented clearly enough to satisfy the so-called "dormant commerce clause". In *South Central Timber Development v. Wunnicke,* the Supreme Court announced that Congress must consent expressly and affirmatively to state or local actions that "impos[e] substantial burdens" on interstate or foreign commerce.[24] We need not decide whether Congress has expressly consented, because the prerequisite for applying dormant commerce clause doctrines does not hold here. The Port's fees have not been proved to impose "substantial" burdens on interstate and foreign commerce.

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23. *See* 36 U.S.C. § 2236(a)(1) (Supp.1988) (consenting to fees for harbor improvements). The tonnage clause, *supra* note 3, was passed in its present form after the Constitutional Convention rejected an amendment proposed by Maryland. That amendment provided that "no state shall be restrained from laying duties of tonnage for the purpose of *clearing harbors* and erecting light-houses." 2 *Records of the Federal Convention of 1787,* at 625 (M. Farrand ed.1966) (emphasis added). The Convention rejected the amendment on Madison's recommendation that duties of tonnage for those purposes should be left to Congress. *Id.* In other words, the legislative history suggests strongly that congressional consent to port fees "for the purpose of" harbor improvements is required; that requirment is not apparent in the history of fees for services rendered.

24. *South Central Timber Development v. Wunnicke,* 467 U.S. 82, 91-2, 104 S.Ct. 2237, 2242, 81 L.Ed.2d 71, 79 (1984).

B. *The Foreign Commerce Clause*

[6] In *Japan Line v. Los Angeles,* the Supreme Court announced that state and local policies affecting foreign commerce are invalid if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to "speak with one voice" in regulating commercial affairs with foreign states.[25]

NOSA does not argue that the fees cause conflicts with foreign sovereigns.[26] Port fees for services are "routinely employed by most port nations".[27] This suggests that nations do not foresee conflicts arising from reasonable fees, a fact which removes them from our purview.[28]

Second, local fees do not fragment the federal government's voice. In the Harbor Development and Navigation Act of 1986, Congress explicitly authorizes local ports to impose port or harbor fees.[29] "Most port nations" allow local fees.[30] Further, Congress has insured

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25. 441 U.S. 434, 446, 99 S.Ct. 1813, 1820, 60 L.Ed.2d 336, 346 (1979).

26. This is in direct contrast to the facts of *Japan Line.* Japan and California had already clashed over the taxation of the containers. 441 U.S. at 451, 99 S.Ct. at 1823, 60 L.Ed.2d at 349.

27. H.Rep. No. 99-251 pt. 4, 99th Cong., 2nd Sess. 21 (1985). Record at 547.

28. *See Japan Line,* 441 U.S. at 455 n. 20, 99 S.Ct. at 1825 n. 20, 60 L.Ed.2d at 352 n. 20 (speculative conflicts do not implicate foreigh commerce clause); *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (same).

29. 36 U.S.C. § 2236-(a)(1)(B) (Supp.1988).

30. *See* H.Rep. No. 99-251 pt. 4, *supra* note 26, at 21.

that the voice of the United States will be as unified as necessary. It has appointed the FMC to regulate fees imposed by local ports.[31] Admittedly, the power to invalidate a fee on constitutional or foreign policy grounds is not in the FMC's statutory mandate.[32] It can, however, require that fees imposed by nonfederal authorities are reasonable. Because port fees are common in international trade, they are part of the backdrop against which foreign affairs is played; reasonable ones are not likely to hamper the federal government's power to conduct foreign relations. If one ever does, Congress may ban it.[33]

C. *The Tonnage Clause*

[7,8] The tonnage clause prohibits any state or local duty imposed on tonnage "without the Consent of Congress". Because we have held that Congress has consented to fees for the services rendered, we do not apply the tonnage clause. Nevertheless, we note that the Port's fees do not fall within the clause's prohibition. The clause prohibits reliance on tonnage duties to raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port.[34] Ships entering Plaquemines Port pay a fee to insure that emergency services will be available; this is a transaction, not a revenue device, a regulation or a payment simply to use the Port. *Clyde*

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31. *46 U.S.C.* §§ 801, 816 (Supp.1988).

32. *See id.*

33. *See Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215, 5 S.Ct. 826, 834, 29 L.Ed. 158, 166 (1885) (courts need not fear state action as long as "the power to arrest collision" with federal policies "resides in the National Congress").

34. *Clyde Mallory*, 296 U.S. at 265-66, 56 S.Ct. at 195, 80 L.Ed. at 218.

Mallory holds that fees for "services rendered to and enjoyed by the vessel" pass muster under the tonnage clause.[35] Here, as there, not every ship paying the fee needs the service; they have paid for the assurance of its availability. In an appeal from an FMC decision on a fee earlier proposed by the Port, the Court of Appeals for the District of Columbia followed *Clyde Mallory* and held that the Port's fee did not violate the tonnage clause.[36] For the reasons just stated, we agree.

D. *The Import-Export Clause*

[9] The Supreme Court has concluded twice in recent years that a fee for "services, such as fire or police protection, supplied by the local government" is not an "impost or duty" proscribed by the import-export clause.[37] The Port charges for protection from emergencies. Its fees, therefore, do not violate the import-export clause.

E. *33 U.S.C. § 10*

[10] NOSA argues that the Port's fees violate the statute admitting Louisiana to the United States. The statute reads:

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35. *Id.* at 227, 56 S.Ct. at 196, 80 L.Ed. at 219.

36. *Plaquemines*, 838k F.2d at 546.

37. *Washington Revenue Dept. v. Stevedoring Ass'n.* 435 U.S. 734, 753, 98 S.Ct. 1388, 1401, 55 L.Ed.2d 682, 699 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287, 96 S.Ct. 535, 46 L.Ed.2d 495, 504 (1976). *Washington Revenue Department* and *Michelin* concerned state taxes on items in international commerce. The Court had to decide whether the amount of tax reflected actual costs incurred by the state. This difficult calculation is not necessary in the case before us, because the parties agree that the fee is reasonable.

> All the navigable rivers and waters of the former Territories of Orleans and Louisiana shall be and forever remain public highways.[38]

Congress declared at the time Louisiana was admitted to the Union that the "river Mississippi and the navigable rivers and waters leading into the same and into the Gulf of Mexico, shall be common highways . . . without any tax, duty, impost or toll therefore, imposed by said State".[39] These declarations proscribe fees for the mere privilege of navigating through waters, or imposts that create preferences for certain private parties over others.[40] The Port charges for services, not for privileges. Its fees create no privileges. Courts have consistently distinguished fees for services from the tolls or imposts prohibited by statutes similar to 33 U.S.C. § 10.[41]

F. *The Harbor Development & Navigation Improvement Act*

Cutting through all the chaff, we come finally to what we consider is NOSA's primary argument: its interpretation of Section 2236 of the Harbor Development and

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38. 33 U.S.C. § 10.

39. 2 Stat. at Large 703 (1812).

40. *Hamilton v. Vicksburg, S. & P.R. Co.*, 119 U.S. 280, 285, 7 S.Ct. 206, 208, 30 L.Ed. 393, 395 (1885) (interpreting 33 U.S.C. § 10).

41. *See Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886) (upholding fees charged for use of locks built on navigable waters under similar statute); *Indiana Port Commission*, 534 F.Supp. at 864-65.

Navigation Improvement Act of 1986 (HDNI).[42] Section 2236(a)(2) of the HDNI expressly allows a port to levy charges to finance emergency response services,[43] when the port is financing a harbor improvement project.[44] Plaquemines is not financing a harbor improvement.

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42. Section 2236 provides, in relevant part:

(a) Consent of Congress

Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

(1) Purposes

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233[sic] of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

(2) Limitations on port or harbor dues for emergency service

Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

43. *Id.* at § 2236(a)(1)(B).

44. *Id.* at § 2236(a)(2).

To infer that the Port's fees violate the HDNI, we must find evidence that Congress intended its express consent to fees for emergency response services in conjunction with harbor improvement projects to imply disapproval of those fees imposed absent projects.[45] We do not find that evidence. Instead we conclude that the HDNI applies when a port has undertaken a harbor improvement project and not otherwise.

1. The HDNI's Legislative History and Language.

By the mid-1980's, many American ports and harbors could not accomodate new, large and efficient ships. Improvements in harbors and ports relied on federal initiative and funding. Every project underwent nineteen independent reviews,[46] with an average of twenty-six years passing between the first study of a project and the project's completion.[47] No new project was authorized between 1970 until shortly before passage of the HDNI.[48] Federal spending on harbor construction declined 78% after the 1960's; mounting pressures on the federal budget made increased appropriations for projects unlikely.[49]

The HDNI authorizes nonfederal ports to help plan projects initiated by the federal government,[50] to initiate

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45. 2A Sutherland Stat.J Constr. § 47.25, at 209 (1984).

46. H.Rep. No. 99-251 pt. 4, *supra* note 26, at 17. Record at 543.

47. S.Rep. No. 99-126, 99th Cong. 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6639, 6640.

48. H.Rep. No. 99-251 pt. 4, *supra* note 26, at 17.

49. S.Rep. No. 99-126, *supra* note 46, at 3; H. Rep. No. 99-251 pt. 4, *supra* note 26, at 16.

50. 33 U.S.C. §§ 2215, 2233 (Supp.1988).

projects to be built by the federal government,[51] and to build projects themselves.[52] Congress intends local involvement in planning and building to speed harbor improvements. The HDNI also requires nonfederal ports to pay part of the costs of improving harbors and ports.[53] Congress wants nonfederal port authorities to share port costs improving harbors. Port fees levied for purposes other than harbor improvements do not threaten accomplishment of these aims. There is therefore no conflict between the fees and the Act invalidating certain fees.[54]

[11,12] Section 2236 sits in a subchapter entitled "Harbor Development". Every section in that subchapter discusses harbor improvements.[55] The organization of the

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51. *Id.* at § 2231.

52. *Id.* at § 2232.

53. *Id.* at §§ 2211(a), 2218, See S.Rep. No. 99-126, *supra* note 46, at 51 (cost-sharing is "heart" of HDNI).

54. *See Jones v. Rath Packing,* 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309-10, 51 L.Ed.2d 604, 614 (1977) (statute should be interpreted as not forbidding acts that do not conflict with its purpose).

55. Section 2231 regulates planning. Sections 2232 and 2233 coordinate state and federal involvement. Section 2234 exempts projects on the Saint Lawrence Seaway. Section 2235 authorizes construction in increments. Section 2238 authorizes appropriations for improvements. Section 2239 regulates sites for dumping material dredged during improvements. Section 2240 authorizes grants for emergency response services to nonfederal ports "operating a harbor improvement project". It is discussed in note 61, *infra.* Section 2241 defines terms necessary for governing harbor improvements.

The lone, partial exception is Section 2237. It requires nonfederal ports to provide information necessary for national security. Although it does not mention harbor improvement, it is in no way inconsistent with our concludion that the entire subchapter applies only when harbor improvements are under construction.

statute is not dispositive, of course. Nonetheless, it suggests strongly that Congress intended to limit its discussion of nonfederal fees to those financing harbor improvements. Senator Abdnor said that the first Senate bill to authorize local port fees "applies only to those ports where a new channel improvement would be put in place."[56] Senator Abdnor was the sponsor and a principal advocate for the HDNI; his comments deserve great weight.[57] We conclude that the HDNI is designed to improve the planning and financing of harbor improvements; it does not address ports' long-standing authority to levy fees for emergency response services.

2. The Play of the HDNI and Congress's Beliefs About the Power of Nonfederal Ports to Impose Fees

The language of the HDNI appears to forbid all port fees except those to which Congress has expressly consented. Nevertheless, we conclude that Section 2236(a)(2) is the solution to a puzzle Congress set for itself—and understood.

The puzzle starts with the idea that Congress believed nonfederal ports could charge only ships that benefitted directly from port services. The House Report noted:

> In the case of *Clyde Mallory Lines v. United States [Alabama]*, 296 U.S. 261 [56 S.Ct. 194, 80

56. Water Resources Development Act: Hearings on S. 1567 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance, 98th Cong. 2d Sess. 222 (1984) (sttement of Senator Abdnor).

57. *See* Eskridge and Frickey, *Legislation*, *supra* note 21, at 735 (problems with legislative history "disappear" when sponsor speaks).

> L.Ed. 215] (1935), the Supreme Court reaffirmed the limitation on the authority of dock ports to levey[sic] fees to direct services, including wharfage, dockage, pilotage, stevedoring, and demurrage. . . .[58]

Section 2236 is built around this belief. Section 2236(a)(1) forbids fees to finance harbor improvements until after the project is complete. Obviously, this prevents non-federal ports from fraudulently charging for projects that are mere speculation. More to the point, it ensures that the fees will be paid by ships that benefit directly from improvements, as the Senate Report noted:

> [The HDNI] permits non-Federal public interests to collect user fees to reimburse themselves for a newly required non-Federal share of the costs.
>
> . . .
>
> The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage.[59]

This framework leaves fees to finance emergency response services in an odd position, however. Nonfederal

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58. H.Rep. No. 99-251, pt. 4, *supra* note 26, at 21. Record at 547. We do not necessarily agree that *Clyde Mallory* distinguishes fees from direct services from those for indirect services. Our purpose here, however, is to attempt to understand what Congress believed.

59. S.Rep. No. 99-126, *supra* note 46, at 7, 1986 U.S.Code Cong. & Admin.News 6644.

ports must continue to provide emergency response services while a project is under constrution. Yet Section 2236(a) prohibits ports from charging for those services "in conjunction with" a project that is under construction; at the least, the section prohibits ports from charging ships for any additional response services made necessary by construction.[60] Ports therefore suffer some financial hardship during construction. Unfortunately, they could not make up the shortfall by charging after construction's complete; the ships paying the fee after construction is complete will not have benefitted directly from the services, because the service is offered during construction. Ports need the consent of Congress to charge for the shortfall. Congress consented to these retroactive fees but limited them to the time the ships are also paying for the improvement itself. In this way the ships that directly benefit from the completed project pay not only for the cost of building the project but also for the ancillary costs of emergency services while it is under construction.

Section 2240 supports our reading. It allows nonfederal ports "operating a [harbor improvement] project" to receive a grant "for the provision of emergency response services".[61] The inclusion of this section in-

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60. In this case we need not decide whether ports may continue to charge their usual fees for emergency response services while a harbor improvement project is underway. Nor do we decide whether fees for such new or additional post-completion emergency response services as may have been made needful by reason of the covered project's completion are subject to the limitation of section 2236(a)(2).

61. Section 2240(a) reads:

> The Secretary is authorized to make grants to any non-Federal interest operation a project for a harbor for provision of emergency response services in such harbor (including contingency planning, necessary personnel training,

dicates that Congress was aware that Section 2236 limited funding for emergency response services. Section 2240 authorizes only $5,000,000 for these grants from fiscal years 1987-1991.[62] Emergency response services cost much more; for example, the Port of Plaquemines spends nearly $1.5 million annually. The discrepancy suggests that Congress saw the HDNI as affecting only a portion of the funding for emergency response services. That portion is the funding for services offered "in conjunction with" a harbor project.[63]

Our interpretation receives further support from the kinds of fees not mentioned in Section 2236. Fees for other

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Footnote 61 continued.

and the procurement of equipment and facilities either by the non-Federal interest, by a local agency or municipality, or by a combination of local agencies or municipalities on a cost-reimbursable basis, either by a cooperative agreement, mutual aid plan, or mutual assisstance plan entered into between one or more non-Federal interests, public agencies, or local municipalities).

62. *Id.* at 2240(b).

63. We recognize that the phrase "grants to any non-Federal interest operationg a project for a harbor for provision of emergency response services" is not entirely clear. *See supra* note 60. We interpret it as authorizing "grants . . . for the provision of emergency response services to "any non-Federal interest operation a [harbor improvement] project". It might mean to authorize grants to finance "a project . . . for provision of emergency response services". On this reading, Section 2240 permits grants to any non-federal port providing emergency response services. The second reading does not distinguish between ports with projects and those withou; the rest of the legislation makes such a distinction. Every other time the HDNI mentions "operating a project" it means a harbor improvement project, not a project already operated by nonfederal ports (as emergency services are). *See e.g.* Section 2241(2)(A) (defining "operations"). Most importantly, Section 2240(b) appropriates $5,000,000 for these grants over six fiscal years. the cost to operate emergency response services in Plaquemines Parish alone is $1.5 million.

services, such as wharfage and pilotage, attach to individual ships; they are not "port or harbor dues" governed by Section 2236.[64] Section 2211, which outlines cost-sharing obligations for projects built by the federal government, requires nonfederal ports to provide lands, easements, rights-of-way, relocations, and dredged material disposal sites;[65] the federal government credits these expenses toward other cost-sharing obligations,[66] thereby subsidizing them. As we concluded, Section 2236(a)(1)(B) allows the marketplace to pay the only fees not discussed in Section 2211; Section 2240 provides a governmental subsidy for any shortfalls.

IV

If ships receive a service they pay for, fees charged by a nonfederal port authority are constitutional. NOSA's attacks based on the dormant and foreign commerce clauses, on the tonnage clause, on the import-export clause, and on the statute admitting Louisiana to the Union fail on this principle.

The HDNI forbids ports from charging for emergency response services "in conjunction with" harbor improvement projects until after the projects are completed. The Act explicitly authorizes non-federal ports to recoup those

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64. *See supra* note 57.

65. 33 U.S.C. § 2211(a)(3).

66. *Id.* at 2211(a)(2). Section 2211(a)(1) requires that nonfederal ports pay 10% of the construction costs of the portion of the project which has a depth not in excess of 20 feet; plus 25% of costs between 20 and 45 feet; plus 50% of costs in excess of 45 feet.Section 2211(a)(2) requires payment of an additional over 30 years. It credits expenses incurred under paragraph (a)(3) to that 10% obligation.

costs by charging after the harbor improvement is finished. This explicit permission does not establish that Congress intended to deny nonfederal ports the authority to impose fees for services performed when no covered harbor improvement project has been undertaken. The decision of the district court is AFFIRMED.

APPENDIX B

NEW ORLEANS STEAMSHIP ASSOCIATION,
Plaintiff-Appellant,

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT.
Defendant-Appellee.

No. 88-3467.

United States Court of Appeals,
Fifth Circuit.

December 29, 1989.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 9, 1989, 5th Cir. 1989, 874 F.2d 1018)

Before WISDOM, GARWOOD, and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby

DENIED; and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

The opinion issued June 9, 1989, 874 F.2d 1018 (5th Cir. 1989), in this case is amended as follows:

1) References to *Indiana Port Commission* are deleted.

2) The following language is added to the paragraph beginning at the bottom of the right hand column of the text on p. 4099 of the slip opinion [874 F.2d 1018 at 1020, bottom of col. 2, 2nd par.]: "For the purposes of this litigation only, the . . .".

3) At the end of note 10 [874 F.2d 1018 at 1020 fn. 10] the following language is added: "NOSA is currently challenging these fees before the FMC. These proceedings are stayed pending the outcome of this case."

4) At the end of note 14 [874 F.2d 1018 at 1021 fn. 14], the following language is added: "NOSA's challange to the October 1986 fees is pending before the FMC. *See* note 10 [874 F.2d 1018 at 1020 fn. 10].

APENDIX C

MINUTE ENTRY
SEAR, J.
JUNE 15, 1988

FILED
JUN 14 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS STEAMSHIP ASSOCIATION — CIVIL ACTION

VERSUS — NO. 87-2548

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT — SECTION G

This action by the New Orleans Steamship Association (NOSA), a non-profit organization of owners, stevedores, and vessel agents, challenges the port and harbor dues imposed by the Plaquemines Port, Harbor and Terminal District (the Port) on the grounds that they violate the Harbor Development and Navigation Improvement Act of 1986, 33 U.S.C. 2231-2241; the statute admitting Louisiana into the Union, 33 U.S.C. sec. 20; the U.S. Constitution, Art. I, sec. 10, cl. 2 (prohibiting imposts or duties on imports or exports); the U.S. Constitution, Art. I, sec. 10, cl. 3 (prohibiting duty of tonnage); and the U.S. Constitution, Art. I, sec. 8 (commerce clause).

The plaintiff seeks injunctive and declaratory relief.

DATE OF ENTRY JUN 14 1988

The constitutionality of the Port's tariffs was first challenged in 1978 but not determined.[1] Instead, in 1980 the case was stayed to allow the Federal Maritime Commission to determine a complaint filed by NOSA challenging the same tariff, pursuant to 46 U.S.C. App. sec. 821.[2] The Federal Maritime Commission (the FMC) has jurisdiction to regulate the imposition of rates or charges by persons "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate

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[1] *Louis Dreyfus Corporation v. Plaquemines Port, Harbor and Terminal District, et al.*, No. 78-860 and consolidated cases (E.D. La. filed March 15, 1978). The parties agreed to dismiss this case in 1983, after the FMC rendered its opinion in the parallel proceedings.

[2] This section provides that:

> (a) Any person may file with the Federal Maritime Commission a sworn complaint setting forth any violation of this chapter by a common carrier by water in interstate commerce, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Commission shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Commission shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.
>
> (b) The Commission, upon its own motion, may in like manner and, with the same powers, investigate any violation of this chapter.

46 U.S.C.A. App. sec. 821 (West Supp. 1988).

commerce." 46 U.S.C.A. App. secs. 801 and 816 (West Supp. 1988).[3]

The Commission found the tariff to be in violation of the Shipping Act of 1916, 46 U.S.C. secs. 801-842.[4] The Port appealed the FMC's order to the Court of Appeals for the District of Columbia Circuit, but the parties settled the matter before a decision was rendered. Under the terms of the settlement, the Port refunded 80% of the fees assessed and held hearings on the redrafting of the contested tariff provisions.

The Port published a new tariff in 1982. Again, NOSA challenged this tariff before the FMC.[5] NOSA contended that the tariff violated the Shipping Acts of 1916 and 1984, 46 U.S.C. secs. 801 *et seq.* and 46 U.S.C. secs. 1701 *et seq.* Respectively, because it gave preferential treatment to non-oceangoing vessels. NOSA also challenged the tariff as violative of the tonnage clause of the U.S. Constitution. The FMC ruled that the imposition of the tariff was consistent with the 1916 and 1984 Shipping Acts, but

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3 **816. Just and reasonable regulations and practices; supervision by Commission**

Every other person subject to this chapter shall establish, observe, and enforce just and reasonabale regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.
46 U.S.C.A. App. sec. 816 (West 1988).

4 *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 21 S.R.R. 219 (I.D. 1981), *adopted* 21 S.R.R. 1072 (F.M.C. 1982).

5 *New Orleans Steamship Association v. Plaquemines Port. Harbor and Terminal District*, Docket No. 83-2 (F.M.C. Sept. 16, 1986).

but that the allocation of fees among users was discriminatory. The FMC declined to reach the tonnage clause issue. NOSA then filed an action in the Eastern District of Louisiana to enforce the FMC's ruling and to enjoin the Port from collecting any more fees under the 1982 tariff.[6] Concurrently, the Port appealed the FMC's order to the Court of Appeals for the District of Columbia Circuit.

In October 1986 the Port filed a revised tariff eliminating the provisions found discriminatory by the FMC. The FMC shortly thereafter formally approved the tariff. Since the revised tariff complied with the FMC's order, the Port moved to dismiss the action filed by NOSA in the district court to enforce the FMC's ruling. The district court found that the filing and approval of the October 1986 tariff rendered NOSA's claim for injunctive relief moot.[7] NOSA appealed on the grounds that viable issues remained in the action. The Fifth Circuit agreed that if the Port sought to collect tariffs assessed during the time between the FMC's September 16, 1986 order and the adoption of the new tariff on October 15, 1986, NOSA would be entitled to injunctive relief. *New Orleans S.S. Ass'n v. Plaquemines Port Harbor,* 816 F. 2d 1075, 1077 (5th Cir. 1987). However, the court affirmed the district court's dismissal of NOSA's action finding that:

> No current, justiciable violation of a Commission order is alleged. Although assessments may have been made during the lapse period, there is

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[6] *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District,* Civ. No. 86-4238 (E.D. La. filed September 29, 1986.

[7] *New Orleans Steamship Assoc. v. Plaquemines Port, Harbor and Terminal District,* Civ. No. 86-4238 (E.D. La. Jan. 15, 1987).

> nothing in the record before us to suggest that the District is presently undertaking, or is likely to undertake steps to collect any illegally assessed charges. Such conduct must be established before injunctive relief may be considered. We agree with the district court that the heavy hand of injunctive relief would not be "proper" in this case.

Id. at 1078.

Subsequently, NOSA filed this action for declaratory and injunctive relief challenging the constitutionality of the revised tariff. NOSA urged new grounds for relief in this suit, that the tariff violated the Harbor Development & Navigation Improvement Act of 1986 and the statute admitting Louisiana into the Union, 33 U.S.C. sec. 10, and raised constitutional challenges based on the commerce, tonnage and import/export clauses of the U.S. Constitution.

The plaintiff and defendant agreed that the merits of the action could be disposed of on the record before the Court in summary motions. The plaintiff moved for summary judgment and the defendant moved to dismiss.

Concurrently, however, the parties raised the lawfulness of the previous tariff under the Harbor Development and Navigation Improvement Act, the statute admitting Louisiana into the Union, the commerce clause and tonnage clause, in the appeal of the FMC September 16, 1986 order before the Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit affirmed the FMC's order in all respects. *See Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission and United States of America*, Nos. 86-1517 &

86-1622, slip op., (D.C. Cir. February 2, 1988). the court reached the tonnage clause issue and determined that the tariff did not violate that clause of the Constitution. However, the court declined to decide the lawfulness of the tariff under the Harbor Development and Navigation Improvement Act. The commerce clause, the import/export clause and the statute admitting Louisiana to the Union, 33 U.S.C. sec. 10, because they were improperly raised in NOSA's supplemental brief. *Id.* at 27. The court also stated that it could not decide the constitutional claims even if it wanted to, since it had no factual record before it. The court suggested that those claims were better brought in this forum. Accordingly, NOSA has filed for leave to amend the complaint challenging the constitutionality of the previous tariff under the commerce clause, the import/export clause, the statute admitting Louisiana into the union, 33 U.S.C. sec. 10, and the Harbor Development and Navigation Act. The Port opposed the motion.

At issue in the motions presently before the Court is whether:

1. the new tariff violates the tonnage clause;

2. the new tariff violates the commerce clause;

3. the new tariff violates the Harbor Development and Navigation Improvement Act;

4. the new tariff violates the import/export clause;

5. the new tariff violates the statute admitting Louisiana into the Union, 33 U.S.C. sec. 10.

The plaintiff is not challenging "the reasonableness of the charges of the District from the standpoint of their

apportionment between oceangoing vessels and other interests, their overall relationship to the expenditures by Plaquemines, or on any other basis."[8]

THE TARIFF:

The tariff at issue is a "Harbor Fee"[9] and "Sup-

---

[8] *Stipulation of Facts* at 4, Attachment to Doc. 12 at 225, Record.

[9] The "harbor fee" is defined in the tariff as:

> All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District, to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including response to vessels in distress with the means available, and to aid in extinguising fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and battures of the waterways of the district, and in the harbor, and upon the private wharves, docks, and immediately adjacent facilities connected thereto without any additional charge (except for the cost of supplies, material and equipment expended by the District in the performance of such services).

Section I, Tariff at 3, Appendix C to NOSA's Reply.

plemental Harbor Fee"[10] charged by the Port.[11] The Port assesses the Supplemental Harbor Fee against oceangoing vessels loading or discharging cargo in the Plaquemines District[12] (the District) at the rate of 2-1/2 cents per ton for dry cargo and 1/2 cent per barrel for liquid cargo. The Harbor Fee is assessed for each day a vessel remains in the District, moored or at anchor, on a graduated scale based on the vessel's length. The Fee is waived for vessels that are detained in the District by fog for a period not exceeding 24 hours. The Fee is assessed at all anchorage sites established by the United States Coast Guard within the District and at private mooring facilities. Every oceangoing vessel serving any port on the Mississippi River must pass through the District both inbound and outbound.

The Port does not own, operate or provide any physical facilities in the form of docks, wharves or aids to

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10 The Tariff defines the "supplemental harbor fee' as:

> A fee charged to supplement revenue necessary for the purposes herein set forth under "Harbor Fee" based on the weight of non-liquid cargo and on barrels of liquid cargo handled or transferred in midstream or when anchored at or moored to any dock, wharf, or mooring facility, or at a public wharf if, in the future, the District has any public wharves, which it does not now have.

Section 1, Tariff at 3, Appendix C to NOSA's Reply.

11 The Plaquemines Port, Harbor & Terminal District is an entity created by the Louisiana Legislature. La. R.S. 34:1351, *et seq.*

12 The Plaquemines Parish Port, Harbor and Terminal District is coterminous with Plaquemines Parish, Louisiana and encompasses approximately 120 miles of the Mississippi River between New Orleans and the Gulf of Mexico.

navigation. All the terminal facilities alongside the river in the District are privately owned. The parties have stipulated that the fees are collected to provide emergency support services.[13] Those services are described as follows:

> Port District services in place and functioning are the operation of two patrol/rescue/early fire response vessels; a ferryboat that has built into it fire fighting pumping capacity and which can be enhanced by the placing of additional firefighting pumping equipment with special emphasis on snorkel nozzles for marine fire fighting; high speed, mobile pumps that can be towed at high speed along the highways adjacent to the river to points of loading the same on the ferryboats or other, prelocated barges, supply vessels or other vessels under a fire plan in place in conjunction with the voluntary fire departments of the District so as to be available for marine, vessel, wharves, and facilities fire fighting. The Port District also provides a 24-hour a day marine communications network oriented to marine emergencies and current locations of Port District personnel and departmental persons (including commissioners who perform executive functions), the marine communications network facilities, fire and police protection services, and the alerting, dispatching and implementing of the protective efforts of local fire units and volunteer fire units who have in place a marine response plan, including fire protection and emergency response plan through an agreement of the Port District with the U.S. Coast Guard and an agreement for a reciprocal fire plan involving the Port of New Orleans fire vessels for providing them to

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[13] *Stipulation of Facts* at 3, Attachment to Doc. 12 at 225, Record.

> the District's vessel, wharves, and facilities as early as possible in port emergencies.[14] There are reciprocal fire aid plans with adjacent fire districts in emergency situations.

Preamble Part B, Tariff No. 1 at B-2, Appendix C to Reply of New Orleans Steamship Association to Memorandum in Support of Motion to Dismiss (NOSA's Reply).

The tariff collected by the Port, then, is a fee for emergency support services provided by the Port for the benefit of the vessels travelling through the District.

The plaintiff contends that the Port lacks the authority to impose the tariff because such a tariff could only be imposed pursuant to the Harbor Development & Navigation Improvement Act of 1986, 33 U.S.C. 2231-2241.

The Harbor Development & Navigation Improvement Act of 1986 (the Act) authorizes navigational improvements in harbors or inland harbors of the United States, 33 U.S.C. sec. 2232(a), and provides federal financing for harbor development projects implemented by non-federal interests if the projects meet the requirements of the Act, 33 U.S.C. sec. 2232(e).

It is uncontroverted that the Port has not undertaken any works pursuant to the provisions of the Act. The plaintiff nevertheless maintains that since the Port has not been authorized by the Act to impose the tariff, it is in

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[14] *See* Memorandum of Understanding Between the Coast Guard, and the Plaquemines Parish Commission Council, approved by the Coast Guard September 4, 1979, providing for coordination of resources to fight fires on board vessels and at waterfront facilities, Appendix D to NOSA's Reply.

violation of the Act's strictures. The plaintiff relies on section 2236 of the Act which provides:

> **(a) Consent of Congress**
>
> Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:
>
> **(1) Purposes**
>
> Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:
>
> (A) (i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or
>
> (ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and
>
> (b) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.
>
> **(2) Limitation on port or harbor dues for emergency service**
>
> Port or harbor dues may not be levied for the purposes described in paragraph (1) (b) of this subsection after the dues cease to be levied for the purposes described in paragraph (a) (A) of this subsection.

33 U.S.C.A. sec. 2236 (West Supp. 1988).

However, the plain language of the provision makes it clear that it applies only to port or harbor dues that are imposed "only in conjunction with a harbor navigation project whose construction is complete . . . to finance the non-Federeal share of construction and operation and maintenance costs of a navigation project . . . and . . . to provide emergency response services in the harbor" on navigation projects implemented pursuant to the provisions of the Act. Since the Port has not undertaken the construction or implementation of any project under the Act, the Act does not apply to the harbor fees assessed by the Port to provide emergency support services for the District. Nothing in the Act, therefore, prevents the Port from charging a fee to ocean-going vessels to pay for emergency support vessels.

Contrary to the plaintiff's contention, moreover, the Act does not constitute the sole authority for imposition of port and harbor dues. In *Clyde Mallory Lines v. state of Alabama*, 296 U.S. 261 (1935), the Supreme Court recognized that states had the authority to assess reasonable fees on vessels to defray the costs of providing services to insure the safety and facilitate the movement of vessels using its harbors. *Id.* at 265-67. The Court upheld a fee imposed by the Port of Mobile, Alabama to defray the expenses of supervising the harbor to insure the safety and facility of the movement of vessels. *Id.* at 265-66. In assessing the Harbor Fee and Supplemental Harbor Fee, the Port is exercising an authority recognized in a long line of Supreme Court cases that has not been eradicated by the passage of the Harbor Development and Navigation Improvement Act of 1986.

The thrust of that Act is to facilitate harbor develop-

ment by providing for "the study, design, and construction of harbor projects by non-Federal interest[s] (sic) and, under certain circumstances, allowing Federal participation in the funding of such projects." H.R. Conf. Rep. No. 99-1013, 99th Cong., 2d Sess. 209, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6723, 6730. Nothing in the Act indicates an intent by Congress to overrule *Clyde Mallory* and to restrict the manner in which states may impose harbor fees, *unless the fees are imposed to finance a new construction project developed pursuant to the Act.*

Having found that the Port's tariff does not come within the scope of the Act and that the state has the authority to impose the tariff to defray the costs of providing emergency support services in the District, I turn to the plaintiff's contention that the tariff violated the statute which admitted Louisiana to the Union, 33 U.S.C. sec. 10. That statute provides simply that "[a]11 the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

The Supreme Court interpreted this statute in *Hamilton v. Vicksburg, S. & P.R. Co.,* 119 U.S. 280 (1886) and held that it did not impair the power which the state could exercise over its rivers. The court affirmed the doctrine it had established in *Escanaba Co. v. Chicago,* 107 U.S. 678 (1883), that:

> [I]f we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the

> clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public.

Hamilton v. Vicksburg, 119 U.S. at 285. In *Escanaba*, the Court held that the commerce clause was not violated by Illinois' exercise of power over bridges across its navigable streams. *Id.*

The Supreme Court clarified the extent of the state's powers when it interpreted a similar statute to refer to rivers and waters in their natural state:

> The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.
>
> . . .
>
> By the terms tax, impost, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements.

Huse v. Glover, 119 U.S. 543, 548-49 (1886). In *Huse*, the Court upheld the imposition of tolls according to the tonnage of a vessel to defray the cost of constructing a lock and dam on the Illinois river under attack as violative of the tonnage clause and the Ordinance of 1787, a statute almost identical to the statute admitting Louisiana into the Union.[15] The Court distinguished emphatically between tolls imposed merely for navigation and charges that constituted compensation for improvements and found that the statute's requirement that rivers be kept as public highways prohibited only the former and not the latter. *See also Cardwell v. American River Bridge Co.,* 113 U.S. 205 (1885) (act of September 9, 1850 admitting California as a state into the Union [16] construed only "to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the *exaction of any toll for their navigation;* and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public, " *id.* at 213 (emphasis added)). The statute's intent is to preserve passage over the state's waterways to all, phohibiting the imposition of a

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[15] The fourth article of the ordinance of 1787 stated that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." Northwest Ordinance, 1 Stat. 50, 52 (1787).

[16] The act provided "that all the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor." Act of September 9, 1850, 9 Stat. 454.

charge for the mere privilege of passage; the Port's tariff meets this requirement and does not deter free passage on the river. Instead, it exacts a reasonable fee from those who dock in the District to ensure the safe passage of all. Nothing in the statute admitting Louisiana into the Union, therefore, prohibits the Port from imposing a reasonable fee upon vessels travelling in the District to defray the costs of providing emergency support services.

The plaintiff contends that the tariff violates the commerce clause, the tonnage clause and the import/export clause to the U.S. Constitution. However, charges levied to defray the cost of services that do not hamper, but indeed, aid interstate commerce, have consistently been upheld by the Supreme Court. *Clyde Mallory Linews v. Alabama*, 296 U.S. 261 (1935); *Huse v. Glover*, 119 U.S. 543 (1886); *Hamilton v. Vicksburg*, 119 U.S. 280 (1886); *Cardwell v. American River Bridge Co.*, 113 U.S. 205 (1885); *Escanaba Co. v. Chicago*, 107 U.S. 678 (1883); *Indiana Port Commission v. Bethlehem Steel Corp.*, 534 F. Supp. 858 (N.D. Ind. 1981). Further, the plaintiff's challenge ignores the clear principle of the commerce clause that only unreasonable burdens on interstate commerce by a state will be struck down. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*). As the Court in *Clyde Marrory* noted:

> The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign are of local con-

> cern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. . . . And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible.

Clyde Mailory, 296 U.S. at 267.

There is a dearth of evidence in the record to support a finding that the tariff imposes an excessive burden on interstate or foreign commerce. The Port's tariff is no more than an incidental burden on interstate commerce; the benefits to the vessels in providing emergency support services far outweigh any slight burden that may result. The Port's practice of assessing a fee for emergency support services does not violate the commerce clause.

As previously noted, the plaintiff's contention that the Harbor Development & Navigation Improvement Act declared Congress' intent to take away the plenary authority of a state over its rivers is simply not supported by the language and structure of the Act and its declared purpose - to address the method of financing new harbor projects. *See* comments by Senator Stafford of Vermont, 144 Cong. Rec. S 16982 (daily ed. Oct. 17, 1986). On the contrary, the Act plainly restricts itself to navigation projects undertaken pursuant to the Act. Moreover, strongly indicative of Congress' desire to preserve the recognized powers of the states to impose reasonable charges on vessels to defray the costs of services to those vessels, is the Act's retention of the regulatory powers of the FMC over general port, harbor and terminal charges assessed to provide services like cargo handling, anchorage, etc. The Act requires that the tariffs imposed pursuant to the Act must likewise be filed with the FMC. 33 U.S.C.A. sec. 2336(a)(6)(A) (West Supp.

1988). There is no indication that Congress intended to do more than provide a new means of financing new harbor development projects. The Act does not constitute Congressional prohibition of state action in the area; nor does the Port's imposition of the tariff in any way conflict with the provisions or purposes of the Act. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). On the contrary, the Port collects the tariff to provide emergency services in collaboration with Coast Guard authorities, in effect relieving the burden that federal authorities charged with regulating and supervising national maritime activities carry. The Port's tariff is consistent with the existing federal scheme.

Further, imposition of the tariff does not violate the import-export clause.[17] The Court has identified the policies behind the clause as:

> [a] concern than an impost or duty might interfere with the Federal Government's regulation of commercial relations with foreign govenments; fear that on account of such state taxation the Federal Government would lose an important source of revenue; and a desire to maintain harmoney among the States, which would be disturbed if seaboard States could tax goods "merely flowing through their ports" to other States not so favorably situated.

R.J. Reynolds Tobacco Co. v. Durham County, N. C., ___ U.S. ___, 107 S.Ct. 499, 514 (1986) (quoting *Michelin Tire Corp. v. Wages*, 423 U. S. 276, 285-86 (1976)).

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[17] 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except . . . ." U.S.Const., Art. I, sec. 10, cl. 2.

The Port's tariff does not interfere with the federal government's regulation of foreign commerce; it falls on foreign and domestic vessels alike and does not single out foreign vessels for unfavorable treatment. *See id.* Similar to the property tax upheld in *Reynolds,* the nature of the tariff in this case is "nothing more than a means 'by which a State apportions the cost of such services as police and fire protection among the beneficiaries. . . .'" of the services. *Id.*

Although this Court recognizes the need for the federal government to speak with one voice when regulating commercial relations with foreign governments, *see Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), the Port's tariff is subject to review and regulation by the Federal Maritime Commission. This suffices to ensure that the Port's assessment of harbor fees does not impose an unreasonable burden on foreign commerce.

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) also sets forth the analysis for the tonnage clause challenge. Simply, the Supreme Court held that the tonnage clause does not prohibit charges made by a state for services rendered such as pilotage, wharfage, or charges for the use of locks. *Id.* at 265-66. It is uncontroverted that the Port's tariff is a charge assessed on vessels that dock in the District to defray the costs of providing emergency support services to all vessels passing through the District. The Port's tariff, therefore, is not prohibited by the tonnage clause. Judge Bork's opinion in the appellate proceedings of the FMC's order discusses in depth the tonnage clause issue and I perceive there is little to add.

I find, therefore, that there are no statutory or constitutional bars to the Port's imposition of the Harbor Fee and Supplemental Harbor Fee. Accordingly, the plaintiff's claim is dismissed.

/s/ Morey L. Sear

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

FILED
APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1498

In the Supreme Court of the United States

OCTOBER TERM, 1989

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

versus

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the fees of the Plaquemines Port, Harbor and Terminal District are prohibited by 33 U.S.C. 2236, "Port or harbor dues" of the Harbor Development and Navigation Improvement Act of 1986 (33 U.S.C. 2231-41), which is Subchapter II of the Water Resources Development Act of 1986 (33 U.S.C. 2201-2311).

2. Whether the decision is in conflict with *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L. Ed.2d 336 (1979).

3. Whether the decision is in conflict with the holding in *South Central Timber Development v. Wunnicke,* 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984).

4. Whether the decision fails to give effect to the Import-Export Clause of the Constitution, article I, section 10, clause 2.

5. Whether the decision fails to give effect to 33 U.S.C. 10, the Act admitting Louisian to the Union; 33 U.S.C. 5; and the Tonnage Clause of the Constitution, article I, section 10, clause 3.

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STATEMENT OF THE CASE

The Plaquemines Port, Harbor and Terminal District (hereafter "Port" or "Plaquemines") is a political subdivision of the State of Louisiana.[1] The Port is geographically coextensive with Plaquemines Parish (the Louisiana equivalent of a county). The Port is the 102-mile narrow stretch of land bordering the Mississippi River from New Orleans, Louisiana to the Gulf of Mexico. *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District.*[2]

There are approximately 9200 oceangoing vessels that annually navigate through the Port on their way to or from other ports along the Mississippi River, of which 3876 or so oceangoing vessels dock or anchor in the Port. Therefore, approximately 5400 [*sic*; actually 5324] vessels simply pass through the Port and do not stop, and are not charged any Port fees whatsover. Unlike most ports, Plaquemine neither owns nor operates wharves, docks, or other facilities. The facilities located within the Port are privately owned.[3]

As stated by the Court of Appeals:

> "By virtue of its police power and an agreement with the United States Coast Guard, the Port has primary responsibility for responding to fires, explosions, and other emergencies that occur within its territory.[7]"

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1. La. R.S. 34:1351-65.

2. 874 F.2d 1018, 1020 (5th Cir. 1989).

3. *Id.*.

The Court's Note 7 Contained the following:

> "Memorandum of Understanding Between the Coast Guard and the Plaquemines Parish Commission Council, approved by the Coast Guard, September 4, 1979; Letter from John L. Bailey, Captain, U.S. Coast Guard, to Jim Hoffman, Plaquemines Parish Fire Marshal (June 3, 1983) ("Maintenance of adequate disaster response capabilities for fires, explosions, and other similar incidents is the responsibility of local port operators, municipalities and public agencies.")."[4]

The Port operates two patrol/rescue/firefighting vessels, with a total of twelve crewmen on duty twenty-four hours, plus a full-time maintenance person; a ferryboat with firefighting capability; mobile pumps; and a 24-hour maritime communications net-work. In addition, the Port's governing authority, Plaquemines Parish, maintains fire and rescue equipment more powerful than it needs for its own use.[5] The services are set forth in detail in the District Court opinion. *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District.*[6]

The Port finances the services it provides by assessing a "Harbor Fee" for each day a vessel remains in the Port pursuant to its tariff. The Harbor Fee is waived for ships that anchor for fewer than 12 hours. The Port also assesses a "Supplemental Harbor Fee' against oceangoing vessels that load or unload cargo in the Port at the rate of

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4. *Id.*

5. *Id.*, n. 8.

6. 690 F.Supp. 1515, 1519 (E.D. La. 1988).

2-1/2 cents per ton for dry cargo and 1/2 cent per barrel for liquid cargo.[7]

Tariff fees are also assessed to the privately-owned terminal facilities, oceangoing barges, inland barges, tugs, tows, offshore supply vessels, and crew (passenger) boats. The ships that navigate through the 102 miles of the Port on their way to and from other ports upriver (such as the Ports of New Orleans, South Louisiana, and Baton Rouge) and do not anchor or exchange cargo in the Port are *not* assessed any fees whatsoever. *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*[8]

In the event of any fire, explosion or other emergency, the Port, under its Agreement with the U.S. Coast Guard, will respond and render emergency services.

For the purposes of this litigation only, New Orleans Steamship Association (hereafter "NOSA") and the Port stipulate that the fees are reasonable.[9]

There are no factual questions involved in this case. The facts were stipulated by the parties in the United States District Court.

The fees now charged by the Port, which are the subject of this case, were enacted on October 15, 1986, as a result of the Federal Maritime Commission (hereafter "FMC") finding on September 16, 1986, that certain exemptions in the Port's tariff were unlawful. The District

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7. 874 F.2d 1018, 1020.

8. 838 F.2d 536, 545 n.8, 548 n.11 (D.C. Cir. 1988).

9. 874 F.2d 1018, 1020, *as amended & reh. den.*, 891 F.2d 1153, 1154 (5th Cir. 1989).

of Columbia Circuit affirmed the FMC's Order in all respects.[10]. The Port submitted its tariff amendments of October 15, 1986 to the FMC which, on November 5, 1986, determined that the amendments complied with the FMC Order of September 16, 1986, directing the elimination of certain exemptions from the tariff.

NOSA had already filed a complaint on September 26, 1986 in the United States District Court for the Eastern Distsrict of Louisiana (No. 86-4238), seeking an injunction barring the Port from collecting fees. The complaint was dismissed as moot because of the tariff amendments of October 15, 1986. The decision was affirmed in *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District*[11].

In the meantime, in December 1986, NOSA filed another complaint to the FMC (Docket No. 86-31) which is stayed pending a final decision in this case, which was filed by NOSA on June 1, 1987.

The District Court dismissed NOSA's claims.[12]. The District Court decision was affirmed by the Court of Appeals.[13]

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10. 838 F.2d 536(D.C. Cir. 1988).

11. 816 F.2d 1074 (5th Cir. 1987).

12. 690 F.Supp. 1515(E.D. La. 1988).

13. 874 F.2d 1018: *as amended & reh. den.*, 891 F.2d 1153.

SUMMARY OF THE ARGUMENT

After five years of litigation before the Federal Maritime Commission, NOSA has now undertaken a broad based statutory and constitutional attack in the Federal Courts, alleging that the Port's tariff fees violate federal statutes and are unconstitutional.

The Port assesses reasonable fees to finance necessary and essential Port services such as fire protection, rescue operations, overall Port safety, and a marine communications system.

The legal authority for the tariff fees is set forth in *Clyde Mallory Lines v. Alabama.*[14] That court stated that a state port may impose a reasonable charge to provide services to users of the port without violating the United States Constitution.[15]

The fees are simply a means of reimbursing the Port for its costs of providing essential services. The Port has the primary responsibility for furnishing fire and rescue protection within its territory because of its firefighting Agreement executed with the United States Coast Guard.[16]

The Port is unique geographically. It is a 102-mile stretch of the Mississippi River; a large number of ocean going vessels (approximately 9200) pass through the Port annually, both inbound and outbound. A great number of

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14. 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935). (In its Petition for Certiorari NOSA incorrectly noted that the Alabama Supreme Court decision, *Clyde Mallory Lines v. State,* 229 Ala.624, 159 So. 53 (Ala. 1935), was reversed by the Supreme Court. That decision was affirmed.)

15. 296 U.S. 261, 267, 56 S.Ct. 194, 196-97, 80 L.Ed. 215, 219.

16. 874 F.2d 1018, 1020.

these oceangoing vesels (approximately 3876) anchor and/or dock at private terminal facilities within the Port, along with inland tows, tugs, inland barges, offshore supply vessels, and crew (passenger) boats, all of which pay the Port's reasonable fees for services rendered. The 5324 oceangoing vessels that simply pass through the Port and do not stop are not charged any Port fees whatsover. Private terminal facilities located within the Port also pay tariff fees to finance emergency response services.

The Port's uniqueness was recognized by the United States Court of Appeals, District of Columbia Circuit. That Court stated that the Port is geographically unique; that the Port does not own or operate wharves, docks or other waterside facilities; and that the Port operates without either tax support or revenues from wharf and dock facilities.[17]

NOSA contends that, since the Port has not been authorized by the Harbor Development and Navigation Improvement Act of 1986[18] ("HDNI") to impose tariff fees for emergency support services, its fees are in violation of HDNI.

HDNI applies to port or harbor dues imposed *only* in conjunction with a harbor navigation project. Nothing in HDNI indicates an intent by Congress to forbid fees that are authorized under *Clyde Mallory* and to restrict the manner in which states may impose harbor fees.

If NOSA's contentions regarding HDNI are found to

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17. 838 F.2d 536, 539-40, 543-44 (D.C. Cir. 1988).

18. 33 U.S.C. 2231-2241.

be correct then *every* harbor fee of *every* port in the nation would, theoretically, be in violation of HDNI, because nearly every port assesses a harbor fee to finance its fire boats. In Louisiana, the Port of New Orleans, the South Louisiana Port Commission, and the Greater Baton Rouge Port Commission, all located on the Mississippi River, have harbor fee provisions in their tariffs as reimbursement for the expenses of their fire boats.

NOSA's contentions that the tariff violates the commerce clause of the Constitution[19] ignore the clear principle of that clause - that only unreasonable burdens by a state on commerce will be struck down. The Port's fees, which assess a reasonable charge for services rendered to Port users, do not violate the commerce clause.

The Port's fees do not violate the import-export clause[20] and do not conflict with the policies behind that clause. The fees do not interfere with the federal government's regulation of foreign commerce; the fees fall on foreign and domestic vessels alike and do not single out foreign vessels for unfavorable treatment.

The nature of the Port's fees is nothing more than a means by which the Port apportions the cost of services (such as fire protection) among the beneficiaries of the services.

Fees charged by the Port are constitutional because the vessels paying the fees receive a service. NOSA's legal attacks based on the dormant and foreign commerce

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19. Art. I, sec. 8, cl. 3.

20. Art. I, sec. 10, cl. 2.

clauses, on the tonnage clause[21], on the import-export clause, on 33 U.S.C. 5, on 33 U.S.C. 10, and on the statute admitting Louisiana to the Union fail on that principle.[22]

ARGUMENT

I.

The Harbor Development and Navigation Improvement Act of 1986 Does Not Prohibit the Port's Fees

The Port contends that HDNI is not applicable to this case.

It is uncontroverted that the Port has not undertaken any harbor improvement projects and that the Port is not financing a harbor improvement.[23]

The fees now being collected by the Port are for emergency response services now being provided by the Port for the benefit of vessels in the Port.

The decision correctly concluded that HDNI applies when a port has undertaken a harbor improvement project and not otherwise.[24]

NOSA'S speculative interpretation of HDNI is in-

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21. Art. I, sec. 10, cl. 3

22. 874 F.2d 1018, 1027.

23. 874 F.2d 1018, 1024.

24. *Id.*

correct. HDNI specifically, at 33 U.S.C. 2236 (a)(2), expressly allows a port to levy charges to finance a harbor improvement project.[25] From this Section of HDNI, NOSA infers that the Port's fees violate HDNI because Congress implied disapproval of fees for emergency response services absent a project.

This interpretation by NOSA arises from its isolation of a special section of the statute without reference to any other section of of the Water Resources Development Act of 1986, of which HDNI forms a part.[26]

HDNI, at 33 U.S.C. 2236(a)(1), forbids ports from charging for emergency response services until after the projects are completed.[27] The Court of Appeals (Judge Wisdom) concluded that obviously this prevents ports from fraudulently charging for projects that are mere speculation.[28] It ensures that the fees will be paid by ships that benefit directly from improvements made under HDNI. [29] Again, there is no HDNI improvement present in this case.

The explicit permission under HDNI to recoup costs of a harbor improvement project does not establish that Congress intended to deny nonfederal ports the authority

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25. *Id.*

26. The Harbor Development and Navaigation Improvement Act of 1986, 33 U.S.C. 2231-41, is Subchapter II of the Water Resources Development Act of 1986, 33 U.S.C. 2201-2311.

27. 874 F.2d 1018, 1026.

28. *Id.*

29. *Id.*

to impose fees for services performed when no project has been undertaken.[30]

The Court of Appeals, at 874 F.2d 1025, correctly stated the purposes of HDNI:

> "The HDNI authorizes nonfederal ports to help plan projects initiated by the federal government, to initiate projects to be built by the federal government, and to build projects themselves. The HDNI also requires nonfederal ports to pay part of the costs of improving harbors and ports. Congress intends local involvment in planning and building to speed harbor improvements. Port fees levied for purposes other than harbor improvements do not threaten accomplishment of this aim. There is therefore no conflict between the fees and the Act invalidating certain fees." (Footnotes omitted.)

The court properly concluded that HDNI is designed to improve the planning and financing of harbor improvements and it does not address ports' long-standing authority to levy fees for emergency response services.[31]

ARGUMENT

II.

The Port's Fees Are Not Barred by the Foreign Commerce Clause Under the *Japan Line* Case

NOSA contends that the Port's fees are prohibited

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30. *Id.* at 1027.

31. *Id.* at 1025.

under *Japan Line, Ltd. v. County of Los Angeles.*[32] That case involves assessments on shipping containers for *ad valorem* taxation purposes wherein the County of Los Angeles sought to value cargo containers in Los Angeles as part of its assessment for *ad valorem* millage taxation. The tax revenues thus received, based on these assessments, were to be used for general purposes of the county government and not for port or harbor purposes as is the case here. The fees assessed vessels by the Plaquemines Port are used to finance the Port's primary responsibility for responding to fires, explosions, and other emergencies pursuant to the Port's Agreement with the U.S. Coast Guard.

The Port does not purport to have derived the power of its tariff enactment from any *ad valorem* tax assessment statutes of the State of Louisiana.

The Port's authority to charge tariff fees is derived from La. R.S. 34:1351-1365, specifically La. R.S. 34:1356 A., B. (amended by Act 93 of the 1986 Louisiana Legislature effective June 23, 1986) and La. R.S. 34:1360. The tariff under attack by NOSA here was effective on October 15, 1986. The power of the Louisiana Legislature to enact the statute is derived from Art. 14, Section 31 of the 1921 Louisiana Constitution which was continued as a statute by the 1974 Louisiana Constitution in Article 14, Section 16 (La. R.S. 34:340.1 *et seq.*), and Art. 6, Section 43 of the 1974 Louisiana Constitution.

The Port's enabling legislation contains authorization (La.R.S. 34:1354-1364) for *ad valorem* tax assessment revenue measures, and is intended to fund bonds issued for wharf and dock facilities. This measure has not been im-

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32. 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed. 2d 336 (1979).

plemented and is not now the basis for the expenditure of the fees collected. The fees of the Port are used for services to Port users. None of the fees collected are used to fund Port bonds, either directly or indirectly.

Thus, NOSA's reliance on *Japan Line* is incorrect. An assessment by the County of Los Angeles on Japanese cargo containers for *ad valorem* tax purposes, which revenues are for general parish government, is completely different from the specifically authorized (by Louisiana state law) and constitutionally-court santioned Port tariff, the revenues from which are specifically used to provide port and harbor services (including emergency response services) to port users (as sanctioned by *Clyde Mallory Lines v. Alabama.*[33]), and those fees are not used to provide for general parish government unless the parish government has provided specific services to the Port that are solely and directly Port-related.

NOSA's argument, raised in its Petition for Certiorari, that if HDNI does not apply to the Port then *Japan Line* is ignored because the nation has lost its ability to speak with one voice with respect to its foreign commerce, is incorrect.

The decision correctly stated that Congress has insured that the voice of the United States will be as unified as necessary because Congress has appointed the FMC to regulate fees imposed by local ports.[34]

In fact, NOSA has already successfully challenged previous fees of the Port (that are no longer in effect) before

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33. 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935).

34. 874 F.2d 1018, 1023.

the FMC under The Shipping Act, 1984.[35]

The Port is regulated by the FMC as a "marine terminal operator" under The Shipping Act, 1984.[36]

The Court of Appeals, D.C. Circuit, found that The Shipping Act, 1984 does create a reasonableness standard. The Court stated at 838 F.2d 546:

> "Section 10(d)(1) of the 1984 Act is, with reference to 'marine terminal operators,' a recodification of section 17 of the 1916 Act. Section 10(d)(1) requires that marine terminal operators 'establish, observe, and enforce just and reasonable regulations and practices.' 46 U.S.C. 1709(d)(1) (Supp. III 1985).[9] Section 10(d)(1) thus creates a reasonableness standard."

The Court's Note 9 stated:

> "Section 10(d(1) of the 1984 Act, 46 U.S.C. 1709 (d)(1) (Supp. III 1985) provides:
>
> No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.
>
> "Section 17 of the 1916 Act (formerly 46 U.S.C. 816 (1982)) required in pertinent part:

35. 838 F.2d 536 (D.C. Cir. 1988).

36. *Id.* at 542-43.

> Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Additionally, as correctly noted by NOSA, The Shipping Act, 1984, creates an anti-discrimination standard.[37] This was held by the D.C. Circuit.[38]

Thus, the Port is subject to FMC jurisdiction for violations of both the reasonableness and the anti-discrimination standards of The Shipping Act, 1984.

NOSA's allegations, which are both explicit and implied in its petition for certiorari, that the Port's fees are not reasonable, or that ships are assessed fees that are not related to the amount of services rendered, or that the Port's fees are discriminatory, are properly before the FMC under the provisions of The Shipping Act, 1984. In fact, NOSA has filed a complaint before the FMC (Docket No. 86-31) which is stayed pending a final decision in this present case.

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37. 46 U.S.C. App. 1709(b)(11),(12).

38. 838 F.2d 536, 547.

ARGUMENT

III.

The Port's Fees Are Not Barred by the Commerce Clause Under the *Wunnicke* Case

NOSA's commerce clause challenge ignores the clear principle of the commerce clause: that only *unreasonable* burdens on interstate commerce by a state will be struck down.

As the Supreme Court, in *Clyde Mallory Lines v. Alabama* stated:

> "The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. . . . And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible."[39]

The District Court in this case held that the Port's tariff is no more than an incidental burden on interstate commerce; the benefits to the vessels by the Port's provision of emergency support services far outweigh any slight burden that may result.[40]

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39. 296 U.S. 261,267, 56 S.Ct. 194, 197, 80 L.Ed. 215,219 (1935).

40. 690 F.Supp. 1515, 1523 (E.D. La., 1988).

South-Central Timber Development v. Wunnicke[41] involved Alaska's requirement that timber taken from state lands be processed within the state prior to export. Alaska claimed that since there was a similar congressional policy the state had congressional approval.

The issues in *Wunnicke* and the issues in this case are completely diffenent. There was not at issue in *Wunnicke* a fee imposed on a reasonable basis for actual services rendered and received.

The Port's fees approximate $1.5 million per year. The fees are not only collected from ships but from privately-owned terminals, inland barges, tugs, tows, offshore supply vessels servicing oil platforms both within state waters and the Gulf of Mexico, and crew (passenger) vessels. NOSA simply does not want to pay its fair share of the services provided by the Port.

The *Wunnicke* decision does not prohibit the Port's fees. The prerequisite for applying dormant commerce clause doctrines does not exist here because the Port's fees have not been proved to impose "substantial" burdens on interstate and foreign commerce.[42]

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41. 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed 2d 71(1984).

42. 874 F.2d 1018, 1022.

ARGUMENT

IV.

The Port's Fees Do Not Violate the Import-Export Clause

The case before this Court is about reasonable fees charged by the Port for services such as fire protection for vessels. There is no charge by the port against cargo. One of the fees (the Supplemental Harbor Fee) is a vessel charge based upon the amount of cargo loaded or unloaded.[43]

The opinions in *Washington Revenue Department v. Stevedoring Association*[44], and *Michelin Tire Corp. v. Wages*[45] state the policies behind the import-export clause. Summarizing, those policies are 1) a concern that an impost or duty might interfere with the Federal Government's regulation of commercial relations with foreign governments; 2) fear that on account of such state taxation the Federal Government would lose an important source of revenue; and 3) a desire to maintain harmony among the States, which would be disturbed if seaboard States could tax goods merely flowing through their ports to other States not so favorably situated.

The Port's fees simply do not offend the policies behind the import-export clause. A fee for services such as fire protection is not an impost or duty proscribed by the import-export clause.[46]

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43. *Id.* at 1020.

44. 435 U.S. 734, 752-53, 98 S.Ct. 1388, 1400-01, 55 L.Ed.2d 682,698-99 (1978).

45. 423 U.S. 276, 285-86, 96 S.Ct. 535, 540, 46 L.Ed.2d 495, 503 (1976).

46. 874 F.2d 1018, 1023.

ARGUMENT

V.

The Port's Fees Are Not Prohibited by 33 U.S.C. 10, by The Act Admitting Louisiana to the Union, by 33 U.S.C. 5, or by the Tonnage Clause

a) *33 U.S.C. 10 and*
The Act Admitting Louisiana to the Union.

NOSA contends that the Port's fees violate the statute admitting Louisiana into the Union, and 33 U.S.C. 10. The statute codified states:

> "All the navigable rivers and waters of the former Territories of Orleans and Louisiana shall be and forever remain public highways."

The District Court opinion stated that the statute's intent is to preserve passage over the Mississippi River to all, prohibiting the imposition of a charge for the mere privilege of passage. The Port's fees meet this requirement and do not deter free passage on the River. Instead, the Port exacts a reasonable fee from those who dock in the Port to ensure the safe passage of all.[47]

The Court of Appeals correctly interpreted the statute which stated that the Mississippi River and the navigable waters leading into it and into the Gulf of Mexico shall be common highways without any tax, duty, imposts or toll imposed by said State. 2 Stat. at Large 703 (1812). The Court of Appeals stated:

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47. 690 F.Supp. 1515, 1521 (E.D.La., 1988).

> "These declarations proscribe fees for the mere privilege of navigating through waters, or imposts that create preferences for certain private parties over others. The Port charges for services, not for privileges. Its fees create no privileges. Courts have consistently distinguished fees for services from the tolls or imposts prohibited by statutes similar to 33 U.S.C. 10." (Footnotes omitted).[48]

The Supreme Court interpreted 33 U.S.C. 10 in *Hamilton v. Vicksburg, S. & P.R., Co.*,[49] and held that it did not impair the power which a state could exercise over its rivers.

In *Huse v. Glover*[50] the Supreme Court upheld the imposition of tolls charged for the use of locks built upon navigable waters under a similar statute.

b) *33 U.S.C. 5.*[51]

This new argument of NOSA was not raised in the District Court. It was not raised in NOSA's opening brief to the Court of Appeals. The first time the argument appeared was in NOSA's reply brief in the Court of Appeals, and NOSA then again raised it in its petition for rehearing of the decision.

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48. 874 F.2d 1018, 1024.

49. 119 U.S. 280,285, 7 S.Ct. 206,208, 30 L.Ed. 393,395(1885).

50. 119 U.S. 543,548-49, 7 S.Ct. 313, 315-16, 30 L.Ed. 487,490 (1886).

51. 33 U.S.C. 5 is set forth in its entirety in NOSA's Petition for Certiorari at pages 2 and 3.

The Port has not had the opportunity to respond to this new argument until now. The Court of Appeals correctly did not decide this issue because it was not raised in NOSA's opening brief.

The Port objects to this new issue being raised by NOSA in its Petition for Certiorari, but now responds with a full reservation of that objection.

NOSA contends the Port's fees are prohibited by 33 U.S.C. 5 and as a result of that statute the decision is at variance, if not in conflict with *Indiana Port Commission v. Bethlehem Steel Corp.*[52]

The Port contends that 33 U.S.C. 5:

> "No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for *passing through* any lock, canal, canalized river, or other work for the use and benefit of navigation, *now belonging to the United States. . . .*" (Emphasis added.)

applies to the Mississippi River only in regard to charges by the United States within a state or port if that charge is for "passing through" a facility now belonging or that may be hereafter acquired or constructed by the United States.

Did the United States construct and does it now own the Mississippi River? Certainly not. God and/or nature had a lot to do with the creation of the Mississippi River. The statute, 33 U.S.C. 5, by its own terms, does not apply.

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52. 835 F.2d 1207 (7th Cir. 1987).

On the nebulous question of "now belonging to" the United States, this belatedly-raised issue to which we continue to object being considered, has been addressed by the courts through the years[53] to the effect, and summarized in the *Clyde Mallory* doctrine and other portions of this brief, and simply stated: that reasonable port charges can be imposed on port users commensurate with actual services available and rendered to them by the collecting entity.

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53. The tariff fees at issue are not collected from vessels passing through the Port, and the Mississippi River does not belong to the United States. This precept was again recently reiterated in *Louisiana v. Mississippi*, 446 U.S. 96, 98-99, 104 S.Ct. 1645,1647, 80 L.Ed.2d 74, 77-78 (1984), to the effect that the lands under the Mississippi River belong to the state. The issue is more complex and far-reaching than that, but it is as simple as the United States does not own the River and the River does not "now belong to the United States". Current Louisiana law on the subject is set forth to the same effect as the law in *Louisiana v. Mississippi, supra*, as to ownership of the Mississippi River beds. Should this Court deem it at all relevant, and cited subject to the reservation of our objection, the relevent provisions of the Louisiana Revised Civil Code are Articles 450, 452, 455, 456, 460, 665; the relevent Louisiana Statutes are La. R.S. 9:1101, 9:1102.1, 9:1102.2. This long-standing body of Louisiana law is all to the effect that title to lands beneath the Mississippi River are state-owned, the waters above are not subject to anyone's ownership; but the paramount powers of control of navigable streams rests with the United States. That control is subject to that general principle as set forth in 65 CJS Navigable Waters, Sections 10-12, 15, 16 and 15 CJS Commerce, Sections 79, 136, and more specifically, *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487(1886), and the other cases cited in this opposition brief to the effect that reasonable port charges collected from port users for actual services rendered to them, have long been recognized as lawful. Absent a specific, clear provision of Congress to the contrary, not present here in any of NOSA's points, collection of those cost-of-service-fees is legal. Those fees are subject to review by the FMC as to reasonableness. Two U.S. District Courts (Judge Collins, Judge Sear), and two U.S. Courts of Appeals (Judge Bork, Judge Wisdom) have so held, and thus NOSA's petition for certiorari should be denied.

But, assuming for purposes of this opposition brief only that 33 U.S.C. 5 does apply to the Port, on the Mississippi River, the Port's fees are not collected from vessels for merely passing through the River or through the Port (which *is* the River between New Orleans, Louisiana and the Gulf of Mexico). The Port collects a reasonable fee from those vessels that dock or anchor in the Port over 12 hours to finance services such as fire protection. No fees are collected from vessels passing through the Port on their way to or from upriver ports.

The Port's harbor fee is defined in the tariff as "All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District, to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including reponse to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and batures of the waterways of the district, and in the harbor, and upon the private wharves, docks, and immediately adjacient facilities connected thereto without any additional charge (except for the cost of supplies, material and equipment expended by the District in the performance of such services)." Tariff, Section I, Definitions.[54]

The Port's supplemental harbor fee is defined in the tariff as "A fee charged to supplement revenue necessary for the purposes herein set forth under "Harbor Fee" based

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54. 874 F.2d 1018, 1020.

on the weight of non-liquid cargo and on barrels of liquid cargo handled or transferred in midstream or when anchored at or moored to any dock, wharf, or mooring facility, or at a public wharf if, in the future, the District has any public wharves, which it does not now have." Tariff, Section I, Definitions.[55]

The harbor fee is assessed for each day a vessel remains in the Port District, moored or at anchor, on a graduated scale based on the vessel's length. Tariff Item 135A.[56] The harbor fee is waived for vessels that are detained for any reason in the Port that anchor in the General Anchorage not exceeding 12 hours. Tariff Item 136B. That Tariff Item states:

> "Item 136 Vessels Exempted From Harbor Fees:
> B. Vessels stopped within the District for the sole purpose of changing pilots, or because of inclement weather, or anchoring in the General Anchorage (see Item 50), remaining less than twelve hours within the limits of the District."

The supplemental harbor fee is assessed against oceangoing vessels loading or discharging cargo in the port at the rate of 2-1/2 cents per ton for dry cargo and 1/2 cent per barrel for liquid cargo. Tariff Item 135B(1).[57] This is premised on the logic of cargo transferred being a more reliable measure of port activity requiring port services, such as this Port renders, than the registered tonnage of a vessel sometimes used in other port tariffs. An example is a vessel with 50,000 registered tons loaded only to 30,000 tons. The Plaquemines Port tariff imposes the fees based on the 30,000 tons of cargo actually transferred.

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55. *Id.*

56. *Id.*

57. *Id.*

The approximately 5400 oceangoing vessels (58% of the total number of 9200 vessels that annually navigate the Port) that simply navigate through the 102 miles of the Port twice, and do not anchor or exchange any cargo in the port, *are not assessed any tariff fees whatsoever.* (Emphasis ours.)[58] Yet in the event of any emergencies the Port, under its Agreement with the U. S. Coast Guard, will respond and render necessary and essential emergency services, including fire protection.

The *Indiana Port Commission* case involved charges to vessels to defray the costs of constructing and maintaining a harbor that had been acquired by the United States. That court held that the charges violated the Federal Statute 33 U.S.C. 5.[59]

But, the facts here bear no relationship whatsoever to *Indiana Port Commission.* The Port's fees are not collected to defray costs of constructing a harbor. It is uncontroverted that the Port is not financing a harbor improvement. Therefore, the decision cannot be at variance or in conflict with the *Indiana Port Commission* case.

c) *Tonnage Clause.*

The decision did not misconstrue *Clyde Mallory Lines v. Alabama,* which held that a reasonable charge for general services is not a prohibited duty.[60]

The District of Columbia Court of Appeals, addressing NOSA's tonnage clause challenge in *Plaquemines v. FMC*[61] stated:

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58. 838 F.2d 536, 539, 545 n.8, 548 n.11.

59. 835 F.2d 1207, 1209-10.

60. 296 U.S. 261, 263, 56 S.Ct. 194, 196, 80 L.Ed. 215, 219 (1935).

61. 838 F.2d 536, 545.

"Our analysis of the tonnage clause is a direct application of the Supreme Court's decision in *Clyde Mallory Lines v. Alabama.* The Port of Mobile, Alabama policed the harbor to insure the safety and facility of the movement of vessels. It charged a fee for the purpose of meeting the expenses associated with the supervision of the port and the execution of its regulations. The Court noted that the tonnage clause prohibits 'all taxes and duties reguardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port.' The clause does not, however, prohibit charges made by a state authority for services rendered such as pilotage, wharfage, charges for the use of locks, or fees for medical inspections. The Court therefore upheld Mobile's fee.

"The *Clyde Mallory* Court distinguished the general services rendered by the Port of Mobile from earlier cases which involved a tax, levied in the guise of wharfage or medical inspections. ... The latter were condemned because they were imposed on all vessels entering a port whether or not they received the benefit of the services. In contrast, the services rendered by the Port of Mobile inured to all who entered the port. A reasonable charge for general services is not a prohibited tonnage duty. The services rendered by the Port also inure to all who use the Port of Plaquemines. All vessels, whether or not they catch fire or need rescue services, benefit from their availablility. Given the seriousness of explosions, fires or other accidents, particularly in view of the crowded condition of this stretch of the Mississippi River, it is especially important that rescue operations be swift and that fires be promptly extinguished." (Citations omitted.)

It is uncontroverted that the Port's fees are to defray the costs of providing emergency response services to all vessels passing through the Port.

Courts have consistently held that ships may be made to pay for services they receive. *See Clyde Mallory v. Alabama* (listing cases)[62]; *Cooley v. Board of Wardens* (local ports may charge for pilotage)[63]; *Vincent v. Foss & Crabtree.*[64]

The Port's fees easily meet the requirements of *Clyde Mallory.* As stated in the Court of Appeals' decision:

> "Emergency response services save lives, reduce damage to property, prevent fires from spreading to ships that would not otherwise need the services, and return the Port to full efficiency after an emergency. Second, the parties have stipulated that the fees are reasonable. Finally, the district court found a 'dearth of evidence' that Plaquemines's fees burden interstate commerce. The Port has the power to impose the fees."[65]

Clyde Mallory holds that port fees for services rendered to and enjoyed by vessels pass muster under the tonnage clause.[66]

CONCLUSION

There are no special and important reasons why

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62. 296 U.S. 261, 268, 56 S.Ct. 194, 197, 80 L.Ed. 215, 219.

63. 53 U.S. (12 How.) 299, 319-20, 13 L.Ed. 996 (1851).

64. 118 Fla. 717, 160 So. 49, 52 (S.Ct. Div. B. 1935).

65. 874 F.2d 1018, 1022.

66. *Id.* at 1023.

NOSA's petition for certiorari should be granted.

The decision of the United States Court of Appeals for the Fifth Circuit is not in conflict with the decision of another United States Court of Appeals.

The decision is not in conflict with either the Constitutional or statutory provisions involved.

Finally, the decision is not in conflict with any applicable decisions of the Supreme Court.

New Orleans Steamship Association, as is typical of a payer of any fees or taxes, in the all-American way, takes the services but does not want to pay for those services.

NOSA has a long history before various courts and the Federal Maritime Commission seeking essentially the same relief - not having to pay its fair share of reasonable tariff fees assessed by the Port to provide reasonable and necessary services of (primarily) emergency and fire response services.

NOSA reaches out to the enactment of the Harbor Development and Navigation Improvement Act of 1986. It is uncontroverted that there are no harbor improvements at issue in this proceeding; the Port is not engaged in any harbor improvement projects.

NOSA speculates that Congress, in enacting HDNI, has by inference prohibited port fees authorized under *Clyde Mallory* (now 55 years old), and the cases cited therein, and an entire body of law dating back more than 100 years, all to the effect that ports may levy reasonable charges to port users for providing fire, safety, police and other services actually rendered to and received by the users of the port.

HNDI, 33 U.S.C. 2231-41, is not at issue in this case. It is factually inapplicable to the Port's fees.

NOSA has urged through inferential hypotheses that by the enactment of HDNI there is clearly-stated congressional intent that forbids port fees being collected for services received by port users, but NOSA is wrong. HDNI only limits those fees as to specific harbor improvement projects pursuant to HDNI. In this case, no such improvement is at issue and NOSA cannot show clear congressional intent to overrule the well-founded logic that holds that a fee for services rendered is not a deprivation of constitutional rights but is clearly authorized pursuant to the long-held legal doctrine of *Clyde Mallory*.

If vessels receive port services commensurate fees charged by a nonfederal port are constitutional. NOSA's attacks upon the Port's fees based on the dormant and foreign commerce clauses, on the tonnage clause, on the import-export clause, on 33 U.S.C. 5, on 33 U.S.C. 10, and on the statute admitting Louisiana to the Union fail on this same principle, i.e., reasonable port fees may be collected for reasonable port services provided.

The Plaquemines Port, Harbor and Terminal District submits that New Orleans Steamship Association's petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

versus

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATUTES:

33 U.S.C. 5 4,5

33 U.S.C. 10 4,5

I. THE HARBOR DEVELOPMENT & NAVIGATION IMPROVEMENT ACT OF 1986 CLEARLY AND SPECIFICALLY PROHIBITS THE PLAQUEMINES FEES.

Congress found, as reflected in the House Report quoted in the petition[1], that non-Federal interests were not empowered to levy fees, under the Constitution, for emergency standby (or indirect) services, absent its authorization.

With this understanding, it then gave authorization only to those non-Federal entities which undertook projects pursuant to the HDNI Act. As Plaquemines states[2], it does not qualify thereunder.

The HDNI Act is very explicit. It forbids fees charged by non-Federal interests prior to the completion of a project (or usable segment); it requires the discontinuance of those fees when the cost of the project has been recovered by the non-Federal interest.

It is, we submit, patently absurd to assert that an interest not undertaking a harbor improvement project is entitled to assess such fees while one proceeding with a project cannot commence to assess them until a unable segment of the project has been completed. It is equally absurd to suggest that an entity not undertaking a project is entitled to charge fees while one creating a harbor improvement is required to cease levying the fees when the cost of its project has been recovered.

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1. Petition, p. 18.

2. "It is uncontroverted that the Port has not undertaken any harbor improvement project and that the Port is not financing a harbor improvement." Opposition Brief for Respondent, p. 8.

The total error of the decision may be reflected best in the statement in the Plaquemines reply[3] that the HDNI Act "prevents ports from fraudulently charging for projects that are mere speculation" while urging that it is entitled to charge fees where even a speculative project is not on the horizon. The terms of the HDNI Act, and its legislative history, are entirely plain. Entities such as Plaquemines can charge fees for emergency response services only when those fees are levied under the terms of the Act and in connection with a project undertaken pursuant to it.

The HDNI Act specifically precludes non-Federal interests from levying such charges other than in conformance with its terms. This is the clearly expressed intent of Congress; Plaquemines does not qualify under the Act and its fees are unlawful.

II. THE DECISION IS DIRECTLY CONTRARY TO *JAPAN LINE.*

The Plaquemines' contention that *Japan Line* is inapposite because it involved an *ad valorem* charge against foreign owned containers while Plaquemines assesses charges against foreign owned vessels based on length and on cargos in foreign commerce based on tonnage (or barrels of liquid) states a distinction without a difference.

The charges are identical in their application against foreign commerce and in their justification, i.e., in *Japan Line* the tax was " 'fairly related to the services provided by' California, services that include not only police and fire protection, but the benefits of a trained work force and the

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3. Opposition Brief for Respondent, p. 9. Quoted from the decision.

advantages of a civilized society."[4]

The argument by Plaquemines that the Federal Maritime Commission exercises a "reasonableness standard" with respect to it simply is not accurate. The statute in question, 46 U.S.C. App. 1709 (d)(1), requires that regulated entities "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Plaquemines does not, in any manner, receive, handle, store, or deliver property. Accordingly, its charges cannot be brought within the ambit of this section of the Shipping Act.

If the nation is to have the ability to speak with one voice, the voice is that of the Congress, not the Federal Maritime Commission. Congress has spoken - in the HDNI Act. It has forbidden the charges assessed by Plaquemines and *Japan Line* cannot be reconciled with the decision.

III. THE DECISION IS DIRECTLY CONTRARY TO *WUNNICKE.*

The *Wunnicke* decision involved a contract by the State of Alaska for the sale of timber on its public lands which required that primary manufacture be conducted in the state. This followed identical requirements imposed by the federal government on timber taken from federal lands within the state. It was held in the Court of Appeals that this "parallel" policy of the federal government authorized Alaska's imposition of those terms on the sale of its timber. Even this did not serve to overcome the prohibitions of the dormant Commerce Clause.

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4. *Japan Line Limited v. County of Los Angeles,* 441 U.S. 434 @ 445, 60 L.Ed.(2d) 336 @ 346, 99 S.Ct. 1813 (1979).

Here, in contrast, we have express congressional prohibitions contained in the HDNI Act, 33 U.S.C. 10 and 33 U.S.C. 5.

The statement by Plaquemines that "the port's fees have not been proven to impose 'substantial' burdens on interstate and foreign commerce"[5] is not meaningful. There was no proof taken; the suit was dismissed on a motion for dismissal without trial. Additionally, as noted in the petition, a charge of $1,500,000 per year is a substantial burden on commerce.

IV. THE PLAQUEMINES CHARGES VIOLATE THE IMPORT/EXPORT CLAUSE

Plaquemines misapprehends the scope of the Import/Export Clause. It does not forbid only charges which are levied directly against the cargo itself.

The form of the charge or its imposition against the vessel rather than directly against the cargo is not material. A stamp tax on charter party agreements for the carriage of cargo was prohibited as a duty on exports, *U.S. V. Hvoslef,* 287 U.S. 1, 17, 59 L.Ed. 813, 820, 35 S.Ct. 459 (1915):

> "Again, it is contended that the tax bore only incidentally upon exportation. It was to be paid on all charter parties of vessels having a 'registered tonnage.' But, aside from any question as to the scope of this provision, the tax as applied to the charter parties here in question was nothing else than a tax on exportation, and to this extent was, in any event, invalid...."

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5. Opposition Brief for Respondent, p. 16.

The Plaquemines charges apply to all cargoes imported and exported to or from the inland states and directly implicate the clause.[6]

V. THE IMPACT OF 33 U.S.C. 10, THE ACT ADMITTING LOUISIANA TO THE UNION, 33 U.S.C. 5, AND THE TONNAGE CLAUSE

We have set forth our views on the several statutes and the constitutional provision in the petition. If the HDNI Act does not preclude the Plaquemines charges, Congress plainly is powerless to do so because it could not have been more explicit.

Plaquemines is correct in stating that the provisions of 33 U.S.C. 5 were not brought to the attention of the courts below until our reply brief before the Fifth Circuit. As to the language in the statute, we submit that the navigable waterways of the nation do "belong" to the United States although the beds are owned by the states and the water is not susceptible to ownership. If this is not the interpretation of the statute, it would appear that it is meaningless. As to the suggestion by Plaquemines that it does not charge for the right of passage, this is true only to a limited extent. It does charge a vessel which by reason of mechanical problems is forced to anchor within the parish or one which remains more than twelve hours

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6. We would note that the charges are not for services rendered but for the standby availability of normal governmental services, fire and police protection. The expenses budgeted to the port district include 5% of the free ferry system, the parish aviation system, the data processing department, and the parish governing body. *New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District*, 23 S.R.R. (Pike & Fischer) 705, 731 (Initial Decision, F.M.C., 1985).

because of inclement weather. Such vessels clearly are exercising a right of passage subject only to emergencies which arise in its course.

Apart from the availability of emergency response services, Plaquemines has no genuine further function. It does not provide for "maintenance of the port and harbor" or "supervision of the shipping of the port", etc. These are functions which have been taken over by the federal government through the Coast Guard and Corps of Engineers. Since it has no wharf or other port facilities, it is a port authority in name only.

CONCLUSION

As suggested in the petition, the appropriate remedy here is to order reversal on the granting of *certiorari* to correct a patently erroneous decision.

The HDNI Act specifically forbids charging for emergency response services by non-federal entities absent a project undertaken pursuant to its terms. This is the mandate of Congress speaking with one voice for the nation under the Commerce Clause.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing reply biref have been served on Louis B. Porterie, Esq. and Robert E. Fontenelle, Jr., Esq. by depositing the same in the United States Mail, postage prepaid, addressed to them at their office, 4000 General de Gaulle Drive - Suite 300, New Orleans, LA 70114, this ____ day of April, 1990.

_____

EDWARD S. BAGLEY